(20,198.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 255.

ELIZABETH M. CHAMBERS, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY.

IN ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

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1 UNITED STATES OF AMERICA, *ss:*

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Ohio, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Supreme Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Baltimore & Ohio Railroad Company, plaintiff in error, and Elizabeth M. Chambers, defendant in error, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity;

2 or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened to the great damage of the said defendant in error as by her complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 5th day of April, in the year of our Lord one thousand nine hundred and six.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

Allowed by
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

April 5th, 1906.

3 [Endorsed:] Filed Supreme Court of Ohio, April 11th, 1906. L. E. Emerson, Clerk.

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4 UNITED STATES OF AMERICA, *ss:*

To The Baltimore & Ohio Railroad Company, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Supreme Court of the State of Ohio wherein Elizabeth M. Chambers is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable John M. Harlan, Associate Justice of the Supreme Court of the United States, this 5th day of April, in the year of our Lord one thousand nine hundred and six.

JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

Service of a copy of the foregoing citation is hereby acknowledged by The Baltimore & Ohio Railroad Company this 11th day of April, 1906.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By ARREL, McVEY & TAYLER,
Attorneys of Record in Supreme Court of Ohio.

5 [Endorsed:] Filed Supreme Court of Ohio, April 11, 1906. L. E. Emerson, Clerk.

6 Supreme Court of the State of Ohio.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

THE STATE OF OHIO, *City of Columbus:*

To the Honorable the Supreme Court of the United States:

Pursuant to the command of your within writ of error, directed to us, we, under our seals, distinctly and openly, the record and proceedings within mentioned, with all things concerning the same, before the judges within named in a certain authenticated transcript to this writ attached, send, as within we are commanded.

In witness whereof, I, Lawson E. Emerson, Clerk of the Supreme Court of Ohio, have set my hand and seal of said court this 11th day of April, 1906.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

7 [Endorsed:] In Supreme Court of Ohio. The Baltimore & Ohio Railroad Company, Plaintiff in Error, *vs.* Elizabeth M. Chambers, Defendant in Error. Murray & Koonce, Attorneys at Law, Youngstown, Ohio.

8 No. 9222.

Supreme Court of Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Error to Circuit Court of Mahoning County, Ohio.

Record.

Arrel, McVey & Tayler, Attorneys for Plaintiff in Error.
Murray & Koonce, W. S. Anderson & Son, Attorneys for Defendant in Error.

Filed Supreme Court of Ohio, Nov. 7, 1904.
L. E. EMERSON, *Clerk.*

9 In the Supreme Court of Ohio.

No. 9222.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Petition in Error.

[Filed October 27, 1904.]

The plaintiff in error, The Baltimore and Ohio Railroad Company, as its cause and ground for this error proceeding against the defendant in error, Elizabeth M. Chambers, says that at the May Term, A. D. 1904, in the Court of Common Pleas within and for the county of Mahoning and State of Ohio, and on the twenty-eighth day of July, 1904, a final judgment was rendered in and by said Court of Common Pleas in favor of said defendant in error
10 and against this plaintiff in error, for the sum of three thousand dollars ($3000), with interest thereon from the first day of said May Term, and costs in a certain action then pending therein wherein this plaintiff in error was defendant, and said defendant in error was plaintiff, and that at the October Term, A. D. 1904, of the Circuit Court in and for said county and State of Ohio, and on the tenth day of October, A. D. 1904, a final judgment

affirming said final judgment rendered, as aforesaid, in and by said Court of Common Pleas, was rendered in and by said Circuit Court, and adjudging the costs in error against this plaintiff in error, but without penalty, in a certain proceeding in error which was duly and legally commenced in said Circuit Court on the twenty-eighth day of September, A. D. 1904, and which was then and there duly pending on said tenth day of October, A. D. 1904, and in which this plaintiff in error was plaintiff in error, and the said defendant in error was defendant in error; and further, this plaintiff in error files herewith marked "Exhibit A," and makes a part of this petition in error such of the original files, papers and pleadings in said action in said Court of Common Pleas as are necessary to exhibit the errors complained of, and, also, the original bill of exceptions, taken, and allowed, signed and sealed in said action in said Court of Common Pleas; and, also, a true, full and correct transcript, duly certified, of all the docket and journal entries made in said action in said court, and of the record and proceedings in said Court of Common Pleas in said action and, also, all the original files, papers
11 and pleadings filed in said error proceeding in the Circuit Court, and, also, a true and correct transcript, duly certified, of all the docket and journal entries made in said error proceeding in said Circuit Court, and of the record and proceedings of said Circuit Court in said error proceeding.

This plaintiff in error further says that there is manifest error to its prejudice in said record and proceedings of said Common Pleas Court in said action in this, to wit:

First. That said Court of Common Pleas erred in overruling the demurrer filed to the second amended petition.

Second. That the said Court of Common Pleas erred in overruling the objection of the defendant below to the introduction of evidence on the trial.

Third. That said Court of Common Pleas erred in overruling the motion of the defendant to take the case from the jury, and dismiss the action at the close of plaintiff's testimony.

Fourth. That said Court of Common Pleas erred in refusing to direct a verdict for the defendant at the close of the testimony.

Fifth. That the verdict is not sustained by the evidence and is contrary to law.

Sixth. That said court erred in overruling the written motion of this plaintiff in error for a new trial of said cause.

This plaintiff in error further says that there is manifest
12 error to its prejudice in said records and proceedings of said Circuit Court in said error proceedings, in this, to wit:

First. That said Circuit Court erred in affirming said final judgment rendered by the Court of Common Pleas in favor of said defendant in error and against this plaintiff in error.

Second. That the said Circuit Court erred in not reversing said final judgment rendered by said Court of Common Pleas in the original action.

Third. That the Circuit Court erred in holding and ruling that

there was no error in said record and proceedings of said Court of Common Pleas prejudicial to this plaintiff in error.

Wherefore, this plaintiff in error prays that said judgment of said Circuit Court, affirming the judgment of said Common Pleas Court may be reversed, vacated, set aside and held for naught, and that said final judgment in said Court of Common Pleas may be reversed and that this plaintiff in error may be restored to all that it has lost by reason of said final judgment of affirmation rendered in and by said Circuit Court, and that it may have such other and further relief as justice and equity may require.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By ARREL, McVEY & TAYLER, *Attorneys.*

Waiver.

The issuance and service of summons in error in the above entitled cause, are hereby waived, and we consent that the voluntary appearance of the defendant in error in this proceeding may be entered in the Supreme Court of Ohio.

MURRAY & KOONCE,
W. S. ANDERSON & SON,
Attorneys for Defendant in Error.

13 In the Circuit Court of Mahoning County, Ohio.

THE BALTIMORE AND OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

[No. 751.]

Transcript of Docket and Journal Entries.

September 28, 1904.—Petition in error, waiver, transcript, original papers and bill of exceptions filed.

October Term, 1904, October 10, 1904.—Affirmed without penalty at costs of plaintiff in error and remanded. J. 4, P. 354.

Journal Entry.

J. 4, P. 354, October Term, A. D. 1904, to wit, October 10.

The said parties appeared by their attorneys, and this cause came on to be heard upon the petition in error, together with the original papers and pleadings and a duly certified transcript of the orders and judgment of the Court of Common Pleas of Mahoning county, Ohio,
14 in the case of Elizabeth M. Chambers *vs.* The B. & O. R. R. Co. and was argued by counsel; upon consideration whereof the court find that there is no error manifest upon the face of

the record in said orders and judgment of said Court of Common Pleas.

It is thereupon considered, ordered and adjudged by this court, that the judgment and proceedings of the said Court of Common Pleas, in said action be, and the same are hereby in all things affirmed; there being, however, in the opinion of the court reasonable ground for this proceeding in error, no penalty is assessed.

It is further considered and ordered that the plaintiff in error pay the costs of this proceeding in error, taxed at $—, for which execution is awarded; and that a special mandate be sent to the Court of Common Pleas, of Mahoning county, to carry this judgment into execution.

To all of which holdings, orders and judgment the plaintiff in error excepts.

[Duly certified.]

Petition in Error.

[Filed September 28, 1904.]

The plaintiff in error, The Baltimore and Ohio Railroad Company, as its cause and ground for this error proceeding against the said defendant in error, Elizabeth M. Chambers, says:

That at the May Term, 1904, of the Court of Common Pleas within and for the county of Mahoning, State of Ohio, and on the — day of July, 1904, a final judgment was rendered in and by said Court of Common Pleas in favor of said defendant in error
15 and against the plaintiff in error in the sum of three thousand dollars ($3000), with interest thereon from the first day of said May Term, and costs in a certain civil action then pending therein, wherein this plaintiff in error was defendant, and said defendant in error was plaintiff; that this plaintiff in error files, herewith, marked "Exhibit A," and makes a part of this petition in error, such of the original files, papers and pleadings in said action in said Court of Common Pleas, as are necessary to exhibit the errors complained of, and also the original bill of exceptions taken by this plaintiff in error and allowed, signed and sealed and ordered to be made a part of the record by the trial judge holding said term of said Court of Common Pleas, and also a true and correct transcript, duly certified, of all the docket and journal entries made in said action in said Court of Common Pleas, and of the record and proceedings of said Court of Common Pleas in said action.

This plaintiff in error further says that there is manifest error to its prejudice in said record and proceedings of said Court of Common Pleas in said action in this to wit:

First. That said Court of Common Pleas erred in overruling the demurrer to the second amended petition.

Second. That said Court of Common Pleas erred in overruling the objection of the defendant to the introduction of evidence on the trial.

Third. That said Court of Common Pleas erred in overruling the

motion of the defendant to take the case from the jury and
16 dismiss the action at the close of plaintiff's testimony.

Fourth. That said Court of Common Pleas erred in refusing to direct a verdict for the defendant at the close of the testimony.

Fifth. That the verdict is not sustained by the evidence and is contrary to the law.

Sixth. That said Court of Common Pleas erred in overruling the written motion of this plaintiff in error for a new trial.

Wherefore, this plaintiff in error prays that said judgment of the Court of Common Pleas be reversed, vacated, set aside and held for naught, and that it may be restored to all things it has lost by reason thereof, and that it may have such other and further relief as justice and equity may require.

THE BALTIMORE & OHIO RAILROAD COMPANY,
By ARREL, McVEY & TAYLER,
Its Attorneys.

Waiver.

Now Comes Elizabeth M. Chambers, defendant in error in the above entitled error proceeding, by her attorneys, and waives the issuing and service of summons in error in this proceeding, and enters her voluntary appearance therein.

ELIZABETH M. CHAMBERS,
By MURRAY & KOONCE AND
W. S. ANDERSON & SON,
Her Attorneys.

17 In the Court of Common Pleas, Mahoning County, Ohio.

[No. 22861.]

ELIZABETH M. CHAMBERS, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Transcript of Docket and Journal Entries.

Docket Entries.

January Term, 1903.

February 2, 1903. Petition and precipe filed. Summons issued.
February 2, 1903. Undertaking for costs filed.
February 16, 1903. Summons returned and filed, endorsed: Received this writ February 2, A. D. 1903, and pursuant to its command on the third day of February, A. D. 1903, I notified the within named defendant, The Baltimore and Ohio Railroad Company, by delivering to James Aiken, a regular ticket agent for said defendant

company at Youngstown, Ohio, a true and certified copy thereof with the endorsements thereon, after having made diligent search for and being unable to find the president, secretary, treasurer, clerk or any other chief officer of said defendant company within
18 said county. Fees $1.75. James M. Thomas, sheriff; by Joseph Smith, deputy.

March 12, 1903. Motion of defendant to strike out filed.

March 12, 1903. Motion of defendant sustained as to first ground and overruled as to other grounds. Leave for plaintiff to amend petition by erasing language stated in first ground. J. 78, p. 479. Continued.

May 4, 1903. Leave for defendant to file answer to amended petition by second Monday. J. 79, p. 5.

May 22, 1903. Answer filed.

May 25, 1903. Motion of plaintiff filed.

June 18, 1903. Motion of plaintiff sustained requiring defendant to specify negligence of deceased and fellow servant. Leave to file an amended answer by July 15. J. 79, p. 210.

July 18, 1903. Amended answer filed. Continued.

October 3, 1903. Applications for letters rogatory filed.

October 5, 1903. Order for letters rogatory to Ct. of C. P. Allegheny Co. Pa. J. 80, p. 122.

October 8, 1903. Notice of application for letters rogatory filed.

December 12, 1903. Deposition filed. Continued.

January 5, 1904. Deposition taken on behalf of plaintiff filed. (Fee $10.00; paid by Chas. Koonce, Jr.)

January 11, 1904. Leave to file a second amended petition instanter. J. 81, p. 2.

January 11, 1904. Second amended petition filed.
19 January 27, 1904. Demurrer to second amended petition filed.

April 1, 1904. Demurrer overruled; defendant excepts and has leave to answer by April 20. J. 81, p. 377.

April 12, 1904. Motion to second amended petition filed.

April 28, 1904. Motion to second amended petition overruled; defendant excepts and has leave to answer by May 15. J. 81, p. 528. Continued.

May 4, 1904. Motion of plaintiff filed.

June 2, 1904. Motion of plaintiff granted; defendant to permit inspection of record, etc. See J. 82, p. 209.

June 27, 1904. Leave to refile amended answer instanter. Leave to reply instanter. J. 82, p. 359.

June 27, 1904. Reply filed.

June 27, 1904. Supplied amended answer filed.

July 28. Trial to jury; jury sworn, etc. Motion of plaintiff to dismiss case overruled; defendant excepts; verdict for plaintiff for $3000.00. J. 82, p. 520.

July 28, 1904. Motion for new trial filed.

July 28, 1904. Motion for new trial overruled; defendant excepts; judgment on verdict for plaintiff *vs.* defendant for $3000.00

and costs; defendant excepts and is allowed forty days to file bill of exceptions. J. 82, p. 521.

July 28, 1904. Bill of exceptions filed.

August 2, 1904. Bill of exceptions transmitted to Hon. Geo. F. Robinson, trial judge.

August 5, 1904. Bill of exceptions returned to the clerk and filed.

20 September 13, 1904. Leave for defendant to supply lost pleading. J. 83, p. 82.

September 13, 1904. Supplied amended answer filed.

Journal Entries.

J. 78, p. 479, January Term, A. D. 1903, to-wit, April 15.

This day this cause came on for hearing on motion of the defendant to the petition of plaintiff, the court, on consideration thereof, sustain the same as to the first ground, and overrule the same as to the other grounds.

Plaintiff has leave to amend petition by erasing language stated in first ground.

J. 79, p. 5, May Term, A. D. 1903, to-wit, May 4.

Defendant has leave to file answer to amended petition by the second Monday.

J. 79, p. 210, May Term, A. D. 1903, to-wit, June 18.

This day this cause came on for hearing on motion of the plaintiff to the answer of defendant; the court, on consideration thereof, sustained the same requiring defendant to specify negligence of deceased and fellow servant. Defendant has leave to file an amended answer by July 15.

J. 80, p. 122, September Term, A. D. 1903, to-wit, October 5.

This cause coming on for hearing upon the motion for letters rogatory in this case, and the same having been argued by counsel for both parties and understood by the court, it is ordered that letters rogatory be issued to the Court of Common Pleas of Lawrence
21 county requesting said court and the judges thereof that they would by its usual process cause the attendance of J. J. Green to appear before one of said judges of the Court of Common Pleas of Lawrence county, State of Pennsylvania, or some competent person to be appointed by said court, or judge thereof, at a time and place to be fixed by said court there to answer on his oath and affirmation each of the several interrogatories propounded to said J. J. Green as attached to the application in this proceeding, and that said court or a judge thereof, will cause said interrogatories and the answers thereto to be committed to writing or typewritten and re-

turned to us under cover and sealed up, together with these presents, not requiring of said court or judge that he shall determine either the relevancy or the competency of such questions asked.

J. 81, p. 2, January Term, A. D. 1904, to-wit, January 11.

Plaintiff has leave to file a second amended petition instanter.

J. 81, p. 377, January Term, A. D. 1904, to-wit, April 1.

This day this cause came on for hearing on the demurrer of the defendant to the second amended petition of the plaintiff; the court, on consideration thereof, overrules the same.

Defendant excepts and has leave to answer by April 20.

J. 81, p. 528, January Term, A. D. 1904, to-wit, April 28.

This day this cause came on for hearing on the motion of plaintiff to the second amended petition of plaintiff; the court on consideration thereof overrules the same.

22 Defendant excepts and has leave to answer by May 15.

J. 82, p. 209, May Term, A. D. 1904, to-wit, June 2.

This day the motion heretofore filed herein by the plaintiff, came on to be heard by the court, and the same was submitted to the court upon the evidence offered by the plaintiff, and the evidence offered by the defendant, upon consideration whereof the court finds that due and proper notice as required by the statute in such case made and provided was served upon the defendant and that due and proper notice of this motion was also duly served upon the defendant; upon consideration thereof the court finds that the statements contained in said motion are true and that the same should be granted.

It is therefore ordered by the court that within four (4) days from the date of the entry hereof, the defendant give to the plaintiff or her attorneys of record, R. B. Murray, Charles Koonce, Jr., and W. S. Anderson, an inspection and copy or permission to take a copy of the said books, papers and documents mentioned and described in said motion, and upon its failure or refusal so to do the same shall be excluded from being given in evidence by the defendant, or if wanted as evidence by the plaintiff the same shall be presumed to be such as the plaintiff by affidavit alleges them to be.

J. 82, p. 359, May Term, A. D. 1904, to-wit, June 27.

Defendant has leave to refile amended answer instanter. Plaintiff has leave to reply instanter.

23 J. 82, p. 520, May Term, A. D. 1904, to wit, July 28.

This day come the parties by their attorneys, and also the jury duly impaneled and sworn according to law, and the trial proceeded.

Before any testimony was given, the defendant moves to dismiss the case and for a direction by the court that the jury return a verdict for the defendant on the ground that the plaintiff was not entitled, under the allegations of the petition, to bring her action in this state, which motion was overruled by the court and the defendant then and there excepted.

Thereupon the jury heard the evidence, the arguments of counsel and charge of the court and retired to their room in custody of the sheriff, for deliberation.

Thereafter, on said day, came the jury into open court with their verdict in writing signed by their foreman, to wit:

"We the jury in the above entitled cause, find the issues joined by the pleadings for the plaintiff and assess her damages in the sum of three thousand dollars ($3000.00)."

J. 82, p. 521, May Term, A. D. 1904, to wit, July 28.

This day this cause came on for hearing on the motion of the defendant to set aside the verdict of the jury heretofore rendered herein, and to grant a new trial. The court, on consideration thereof, overrules the same, to which defendant excepts.

It is therefore considered by the court that the plaintiff recover from the defendant, the sum of three thousand dollars
24 ($3000.00) and her costs herein expended, and that the defendant pay its own costs, for which execution is awarded.

To all of which the defendant duly excepts and is allowed the statutory time from and after this date in which to prepare and file its bill of exceptions herein, which, when filed and allowed by the court, shall be a part of the record herein, but not be recorded.

J. 83, p. 22, September Term, A. D. 1904, to wit, September 13.

Defendant has leave to supply lost pleading.

Security for Costs.

Whereas, at the January Term, A. D. 1903, of the Court of Common Pleas, holden in and for Mahoning county, in the State of Ohio, the said Elizabeth M. Chambers was ordered to enter security for costs.

Therefore, I, Mrs. Louise M. Anderson, do acknowledge myself security for costs for said Elizabeth M. Chambers in case the said

Elizabeth M. Chambers shall fail to pay all costs which shall be adjudged against her or which she shall be liable to pay in said suit.

MRS. LOUISE M. ANDERSON.

Approved February 2, 1903.

J. HOWARD EDWARDS, *Clerk*,
By HUGH SWANEY, *Deputy Clerk*.

(Certificate attached.)

25 *Petition.*

(Filed February 2, 1903.)

ELIZABETH M. CHAMBERS, Plaintiff,
vs.
THE BALTIMORE AND OHIO RAILROAD COMPANY, Defendant.

Plaintiff, Elizabeth M. Chambers, says that the defendant is a duly and legally incorporated railroad company, and was such at all the times hereinafter stated, and as such corporation was operating a line of railroad extending from New Castle, in the State of Pennsylvania, to Allegheny, in said State of Pennsylvania, by running thereon passenger and freight cars; that said line of railroad as aforesaid passed through the towns of Glenshaw, Wittmer and Sharpsburg; that the said Glenshaw is west of Wittmer, and that the town of Sharpsburg is east of Wittmer.

Plaintiff says that said defendant company had, at the times herein mentioned, and for a long time prior thereto, a train dispatcher in their employ, who was located at Pittsburg, Pennsylvania, and whose duty it was to direct the movement of trains, and to warn trains of any obstruction that might be upon said track, and to notify the crew of the trains where they might become endangered if any other train was upon said track.

26 Plaintiff further says that her decedent, Harry E. Chambers, was in the employ of said defendant company, as an engineer of a passenger train, which was running between New Castle and Allegheny, Pennsylvania, and from Allegheny to New Castle; that on the 19th day of Sept., 1902, the said Chambers was proceeding on his way with his train from New Castle to the city of Allegheny, in the State of Pennsylvania, and at or near Wittmer Station, he collided with a train which belonged to what was known as the Buffalo, Rochester and Pittsburg Railroad Company, which train, by a lease from the said Baltimore and Ohio Railroad Company, had the right to pass over the tracks of said defendant company. (Plaintiff is unable to set out the terms of the lease for the reason that the same is in the possession of the defendant company.)

Plaintiff further says that by a rule of said defendant company trains proceeding from Allegheny westward ran upon the west-bound track of said company, and trains going east in the direction of Allegheny ran upon the east-bound track; that it was the duty of said train dispatcher whenever it became necessary for the trains

that ran upon the west-bound track to occupy the east-bound track to notify the crews of the trains that were liable to be using the east-bound track.

Plaintiff says that in consequence of said Buffalo, Rochester and Pittsburg train being upon the said east-bound track, and without any knowledge or notice or warning to the said decedent of the same, or to any member of his crew, said trains collided at
27 Wittmer, and the said Harry E. Chambers received such injuries that he shortly thereafter died.

Plaintiff further says that said death was directly and proximately caused by the gross negligence and carelessness of said defendant company in this, to wit, that on the morning of said nineteenth day of September, 1902, a wreck had occurred at or near what was known as Tunnel No. 1, which was east of Wittmer, and under the directions and orders of said train dispatcher the trains which had the right to use the west-bound track were transferred to the east-bound track, and that said train dispatcher negligently failed and omitted to give any notice or warning to said decedent, Harry E. Chambers, or to any member of his crew, that said trains might be expected upon said east-bound track.

Plaintiff says that said defendant company was also guilty of negligence, which directly and proximately produced said death, by failing to notify the operator at Glenshaw to hold said train of said Chambers, until said Buffalo, Rochester and Pittsburg train had passed; that he was also guilty of gross negligence and carelessness in failing and neglecting to notify said Buffalo, Rochester and Pittsburg train not to proceed upon said east-bound track, until said train upon which said Chambers was engineer should have passed; that said defendant company was also guilty of negligence and carelessness in failing and neglecting to promulgate any rule by which it made it the duty of said train dispatcher to notify said operator as aforesaid.

28 Plaintiff further says that said Harry E. Chambers had no knowledge whatever, nor did he have equal means of knowing with said defendant company, that said Buffalo, Rochester and Pittsburg train was upon said east-bound track, nor neither did he see said train in time to have avoided the collision; that at the point where the collision occurred there was a sharp curve, so that neither of the crews could see the other train.

Plaintiff says that as a result of said collision said Harry E. Chambers was mangled, crushed and injured to such an extent that he shortly thereafter died.

Plaintiff says that she is a resident of the State of Pennsylvania, and was at the times hereinbefore mentioned; that at the time of the death of said Harry E. Chambers he also was a resident of the State of Pennsylvania, and said wrongful act which caused the death of Harry E. Chambers, and the death, occurred within the said State of Pennsylvania: that she brings this action under and by virtue of the act of assembly of the said State of Pennsylvania, which was passed, and which was in full force and effect on said nineteenth day

of September, 1902, and for some time prior thereto, and which is still in full force in said state. That said act of assembly provides:

"That whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured during his or her life, the widow of any such decedent, or if there be no widow, the personal representative, may maintain an action for and recover damages for the death thus oc-
29 casioned." It also provides that: "The person entitled to recover damages for any injury causing death shall be the husband, widow, children or parents of the decedent, and no other relative, and the sum so recovered shall go to them in the proportion as they would take his personal estate in case of intestacy, and that without liability to creditors."

Plaintiff further says that at and since the time of the committing of the grievances hereinbefore set forth as caused by the defendants, the State of Pennsylvania allowed the enforcement in its courts of the provisions of Sections 6134, 6134*a* and 6135 of the Revised Statutes of the State of Ohio, being statutes of a similar and like character with the foregoing statutes of Pennsylvania; that at the time of said wrongful death, by the decisions of the courts of Pennsylvania, an action for damages might be maintained in the courts of the State of Pennsylvania, and enforce the liability incurred under the statutes of Ohio, for the wrongful act of defendant; that the said Harry E. Chambers brought no action to recover for the wrongful acts of said defendant during his lifetime.

Plaintiff says that at the time of the death of the said Harry E. Chambers he was of the age of thirty years, in the enjoyment of good health, and was earning and able to earn the sum of one hundred and twenty-five dollars per month; that he left as his only heir this plaintiff, his widow; that by reason of the wrongful acts of the said defendant company the plaintiff has been damaged in the
30 sum of ten thousand dollars ($10,000), for which she prays judgment.

W. S. & W. N. ANDERSON,
Plaintiff's Attorneys.

(Duly verified.)

Precipe.

To the Clerk:

Issue summons for the defendant, returnable according to law, endorsed: "Amount claimed ten thousand dollars."

W. S. & W. N. ANDERSON,
Plaintiff's Attorneys.

Second Amended Petition.

(Filed January 11, 1904.)

Now comes the plaintiff, Elizabeth M. Chambers, and leave of court first having been obtained to file this, her second amended petition herein, for her cause of action, says that the defendant, The

Baltimore and Ohio Railroad Company is now, and at all the times hereinafter referred to was, an association of persons duly incorporated and organized as a railroad company under the laws of the State of Maryland, and as such corporation was and now is in the possession of and operating a railroad from the city of Baltimore, in the State of Maryland, to the city of Chicago, in the State of Illinois, and that said railroad is operated by said defendant for the carrying of passengers and freight.

That a portion of said railroad so operated by defendant as aforesaid, was a line of railroad extending from Allegheny to New Castle, in the State of Pennsylvania.

31 That along the line of said railroad there are, and at the time of the collision hereinafter referred to were, maintained by defendant the railway stations known as Glenshaw, Wittmer and Sharpsburg; that said Glenshaw station is about 7.10 of a mile west of Wittmer and that said Sharpsburg station is about 2 3.10 miles east of Wittmer, and that all of said stations are in the county of Allegheny in the State of Pennsylvania.

Plaintiff further says that Harry E. Chambers, her decedent, was on the nineteenth day of September, 1902, and for some time previous thereto had been in the employ of the defendant, as a train operative in the capacity of a locomotive engineer performing his duties as such on passenger trains running between the city of Allegheny and New Castle Junction, in the State of Pennsylvania.

That on the nineteenth day of September, 1902, he was performing his duties as said locomotive engineer upon one of said defendant's passenger trains moving over said railroad line from New Castle Junction towards the city of Allegheny. That while in the performance of his duties as aforesaid and while said train upon which he was performing his duties was at or near the station known at Wittmer, aforesaid, said train was run into by a train approaching it from the opposite direction on the same track, by reason of which he was so mangled, crushed and injured that he shortly thereafter died.

Plaintiff further says that the defendant's line of railroad between said points of Allegheny and New Castle Junction was, at and about the time of the accident, a double track road. But that dur-

32 ing about six hours prior to the time of the collision hereinbefore referred to said road was being operated as a single track road between the stations of Sharpsburg and Glenshaw aforesaid, for the reason that the west-bound track of said road was obstructed by the wreckage of a freight train thereon at or near a place thereon known as Tunnel No. 1, which is about 7.10 of a mile west of said station of Sharpsburg.

Plaintiff further says that by rule of said defendant company at the time of the collision, in full force and effect, trains proceeding from Allegheny westward ran upon the west-bound track of said company, and trains proceeding eastward in the direction of Allegheny ran upon the east-bound track of said road.

Plaintiff further says that said defendant at the time of said collision and for a long time prior thereto, maintained in its offices

in the city of Pittsburg, in said State of Pennsylvania, chief train dispatchers, whose duty it was to direct the movement of trains running between said city of Allegheny and New Castle Junction, and whose duty it was to warn said trains of any obstruction that might be upon the tracks over which the trains were running, and to notify the crew of said trains where the movement of their trains might be obstructed.

That by reason of said road being thus so used as a single track road during said time, the defendant used the east-bound track of said road between said points of Sharpsburg and Glenshaw for the conducting of the west-bound trains running over its said
33 road as well as the east-bound trains being then run over said road.

Plaintiff further says that it was necessary in the exercise of due care in that behalf that while said west-bound trains were thus being run over said east-bound track as aforesaid, that all east-bound trains should be notified by the defendant of the use by, and approach of, said west-bound trains on said east-bound track between said points of Sharpsburg and Glenshaw before ordering and permitting said east-bound trains to run over said road between said points. Plaintiff further says that it was necessary in the exercise of due care in that behalf, that while said east-bound trains were thus being run over said east-bound track as aforesaid, that all west-bound trains should be notified by the defendant of the use by, and approach of, said east-bound trains on said east-bound track between said points of Sharpsburg and Glenshaw before ordering and permitting said west-bound trains to run over said road between said points.

Plaintiff further says that on said morning of the nineteenth day of September, 1902, the said defendant, through its agents and employés charged with that duty, knowing of the approach of plaintiff's decedent's train, which was known as No. 156, towards its said station known as Sharpsburg, and knowing the time it would arrive at said station, ordered and permitted a train known as Buffalo, Rochester and Pittsburg train No. 121 to proceed over said east-bound track from said Sharpsburg toward said Glenshaw stations, and knowing that said train No. 121 was approaching on said east-bound
34 track towards Glenshaw station, ordered and permitted said plaintiff's decedent's train No. 156 to proceed over said east-bound track between Glenshaw station and Sharpsburg station without in any manner notifying plaintiff's decedent or any one in charge of said train of the approach of said west-bound train on said east-bound track.

Plaintiff further says that said train No. 121 ran into said train No. 156 at said station of Wittmer at 9:30 o'clock a. m. of said nineteenth day of September, 1902.

Plaintiff further says that the defendant and its agents and employés in that behalf, unlawfully, negligently and carelessly ordered and permitted plaintiff's decedent's train, No. 156, to proceed over said east-bound track at the time and place of the accident, without giving any notice or warning to plaintiff's decedent or those in

charge of his said train that said train No. 121 was upon said east-bound track.

Plaintiff further says that the defendant and its agents and employés in that behalf unlawfully, negligently and carelessly ordered and permitted said west-bound train No. 121 to proceed over said east-bound track, at the time and place of the collision with plaintiff's decedent's train, without in any manner giving it and those commanded to conduct it to said station of Glenshaw, any notice or warning that plaintiff's decedent's train No. 156 was approaching eastward upon said track.

Plaintiff further says that the defendant and its agents and employés in that behalf unlawfully, negligently and carelessly failed and omitted to promulgate and enforce any rule whereby it
35 was incumbent on the chief train dispatcher of said defendant, at his office in the city of Pittsburg, in said State of Pennsylvania, to order plaintiff's decedent's train to remain at said station of Glenshaw until said west-bound train No. 121 had passed it at said station of Glenshaw. It being necessary in the exercise of due care in that behalf to promulgate and enforce such rule when defendant was operating its road as a single track road.

Plaintiff further says that it was necessary in the exercise of due care in that behalf for the defendant and its agents and employés charged with the performance of that duty to provide sufficient employés to notify at the proper time plaintiff's decedent's train that said east-bound track was being used by said west-bound train No. 121, and that said train No. 121 was approaching westward on said track from said Sharpsburg to Glenshaw station. That at the time plaintiff's decedent's train left Glenshaw station for Sharpsburg on the morning of the collision, and for a long time prior thereto, to wit, since the wrecking of said freight train on said west-bound track, which occurred about 3 o'clock on the morning of said day, the defendant through its agents and employés charged with the performance of that duty had ordered its engine No. 208 to conduct west-bound trains from Sharpsburg to Glenshaw station, without in any manner providing means for protecting and warning said east-bound trains, and especially plaintiff's decedent's train, between said stations of the approach of said engine and the trains which
36 they were thus conducting from said station of Sharpsburg to said station of Glenshaw, no other employés being furnished for said purpose except the engineer and fireman of said train, all of which was known to the defendant, and by the exercise of ordinary care in that behalf could have been known by it.

Plaintiff further says that the defendant and its agents and employés in that behalf unlawfully, negligently and carelessly failed and omitted to furnish sufficient employés during the time that said east-bound track was being used by it for the running of west-bound trains thereon, for the purpose of notifying the plaintiff's decedent's train that said east-bound track was being thus used, and that said train No. 121 was approaching westward thereon from said station of Sharpsburg to said station of Glenshaw.

Plaintiff further says that the defendant and its agents and em-

ployés in that behalf unlawfully, negligently and carelessly failed to place and maintain on said road, during the time said east-bound track was being used by it for the purpose of running west-bound trains thereon, a flagman for the purpose of notifying plaintiff's decedent's train of the approach of west-bound trains on said track.

Plaintiff further says that said defendant and its agents and employés unlawfully, negligently and carelessly failed to notify its telegraph operator at said Glenshaw station to hold said train No. 156 until said train No. 121 had passed.

37 Plaintiff further says that each and all of the foregoing unlawful, negligent and careless acts and omissions of the defendant and its agents and employés was the proximate cause of her decedent's injury and death, and concerning each of which unlawful, negligent and careless acts and omissions hereinbefore referred to the defendant and its agents and employés in that behalf had knowledge, and in the exercise of ordinary care in that behalf should have had knowledge thereof, and concerning each and all of said unlawful, negligent and careless acts and omissions on the part of the defendant and its agents and employés plaintiff's decedent had no knowledge, nor could he, in the exercise of ordinary care in that behalf have had knowledge with reference thereto, nor did plaintiff's decedent have any knowledge of the presence and the approach of said train No. 121 or any other train on said east-bound track between Sharpsburg and Glenshaw on said nineteenth day of September, 1902, until the instant of collision between said trains, nor could he have had knowledge thereof before that time in the exercise of ordinary care in that behalf, nor did he have equal means with the defendant of acquiring said knowledge.

Plaintiff further says that she is unable to herein set forth the names of the said servants and employés of the defendant, concerning whose unlawful, negligent and careless acts and omissions she has hereinbefore referred to for the reason that she has been, and is, unable to ascertain the same.

38 Plaintiff further says that at all the times hereinbefore referred to her decedent, Harry E. Chambers, was in the exercise of due care on his part.

Plaintiff further says that she is now, and since the nineteenth day of September, 1902, has been, the widow and only heir at law of Harry E. Chambers, and at all times hereinbefore referred to she was a resident and citizen of the State of Pennsylvania. That at the time of the death of decedent, Harry E. Chambers, and for a long time prior thereto, he also was a resident and citizen of said State of Pennsylvania, and that the unlawful, negligent and careless acts and omissions hereinbefore referred to as being the proximate cause of the death of said Harry E. Chambers, occurred within the said State of Pennsylvania. That by reason of the premises a right of action accrued to plaintiff upon the death of her husband, the said Harry E. Chambers, in the manner aforesaid, by the means aforesaid, under and by virtue of the act of the General Assembly of the State of Pennsylvania, approved April 15, 1851, and the act of the General

Assembly of said State, approved April 26, 1855. Sections 18 and 19 of the act of April 15, 1851, are as follows:

"SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

39 "SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

Sections 1 and 2 of the act of April 26, 1855, are as follows:

"SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors."

"SEC. 2. That the declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter."

Plaintiff further says that by Sec. 21, Article 3, of the Constitution of the State of Pennsylvania, of 1874, it is provided as follows, to wit:

"SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from said injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Plaintiff further says that by the decisions of the Supreme Court of Pennsylvania made under and construing the above sections or provisions of the constitution of said state, it has been held

40 and judicially determined that the limitations as to the amount that might be recovered for injuries resulting in death, in all acts passed by the General Assembly of said state, and approved prior to the adoption of said constitution, were abrogated and annulled by said constitutional provision.

Plaintiff further says that said constitutional provisions were in full force and effect and were applicable to and governed the facts hereinbefore set forth.

Plaintiff further says that said State of Pennsylvania allows and permits the enforcement in its courts of the statutes of other states of like character with its own, and of like character with Sections 6134, 6134*a* and 6135, and supplements thereto of the Revised Statutes of Ohio.

Plaintiff further says that by virtue of said statutes, and as the same have been judicially construed by the courts of the State of Pennsylvania, she, as the widow of the said Harry E. Chambers, is the only person entitled to bring this action. That no action has

heretofore been brought in behalf of the injuries aforesaid, by any one, in any court.

Plaintiff further says that at the time of the death of said Harry E. Chambers, he was of the age of 30 years, in the enjoyment of good health, and was able to earn and did earn the sum of one hundred and twenty-five ($125.00) dollars per month. That by reason of the wrongful acts of the defendant company, plaintiff has been damaged in the sum of ten thousand dollars ($10,000.00),
41 for which amount she prays judgment with her costs.

W. S. ANDERSON AND
MURRAY & KOONCE,
Attorneys for Plaintiff.

[Duly verified.]

Amended Answer.

[Filed July 18, 1903; refiled June 27, 1904.]

Now comes The Baltimore and Ohio Railroad Company and by leave of court first had, and obtained, files this, its amended answer and says:

It admits that it is a corporation, duly organized and existing under the laws of the State of Maryland; admits that Harry E. Chambers was at one time in the employ of the defendant, The Baltimore and Ohio Railroad Company; admits that in a collision between a train operated by The Pittsburg and Western Railroad Company on lines owned by The Pittsburg and Western Railroad Company and a train operated by The Buffalo, Rochester and Pittsburg Railroad Company, said Harry E. Chambers was injured and as a result of which subsequently died.

Further answering this defendant denies each and every other allegation, averment and statement in said amended petition contained and says that the same are false and untrue.

This defendant further says that said Harry E. Chambers was advised and informed that train 121, which was the train which collided with Chambers' train, would pass his (Chambers') train at
42 Glenshaw, and that notwithstanding the fact that he was advised that said train 121 was to pass his (Chambers') train at Glenshaw, and that he should hold his train until train 121 came in, that said Chambers proceeded from Glenshaw, and as a result of his failure to remain at Glenshaw collided with train 121 at a point between Glenshaw and Wittmer.

This defendant further says that in consequence of his failure to remain at Glenshaw and of his proceeding to Wittmer when he was advised and informed that train 121 going in an opposite direction was to meet him at Glenshaw, the accident was caused and that said accident was directly caused by Harry E. Chambers' own negligence and want of care and was the result of his own negligence and want of care and not otherwise.

Second Defense:

For a second defense this defendant says that said accident and

the death of the said Harry E. Chambers was caused or contributed to by the negligence of a fellow servant or fellow servants of said Harry E. Chambers.

Wherefore, this defendant having fully answered, prays hence to be dismissed.

ARREL, McVEY & TAYLER,
Attorneys for Defendant.

[Duly verified.]

43 *Reply.*

[Filed June 27, 1904.]

Plaintiff for reply to the amended answer filed herein says that she denies that the said Harry Chambers was advised and informed that train 121, which was the train which collided with Chambers' train, would pass his Chambers') train at Glenshaw, and that he should hold his train until train 121 came in; denies that said collision was caused by the negligence of the said Harry Chambers, or that it was caused by the negligence of his fellow servants, and having fully replied prays judgment as asked for in her petition.

W. S. ANDERSON & SON,
Plaintiff's Attorneys.

[Duly verified.]

Motion for New Trial.

[Filed July 28, 1904.]

Now comes the defendant and moves the court to set aside and vacate the verdict of the jury and for a new trial, for the reasons:

First. The court erred in overruling the demurrer to the second amended petition.

Second. The court erred in refusing to sustain the motion of the defendant to direct a verdict for the defendant.

ARREL, McVEY & TAYLER,
Attorneys for Defendant.

44 *Bill of Exceptions.*

[Filed July 28, 1904.]

Be it remembered, that at the trial of the above entitled cause, in the Court of Common Pleas, at the May Term, A. D. 1904, before Honorable G. F. Robinson, presiding judge, and a jury, it was admitted by the plaintiff that at the time of the grievances complained of in the petition, and for a long time prior thereto, she and her said husband, Harry E. Chambers, were and had been citizens and residents of the State of Pennsylvania.

Thereupon, the plaintiff, to maintain the issues on her part, offered in evidence the deposition of J. J. Green.

Thereupon, before said deposition was read, the defendant objected to the introduction of any testimony in the case for the reason that the averments of the petition do not constitute a cause of action against the defendant, and that as the plaintiff and her decedent were, at the time of the occurrence of the grievances complained of, citizens and residents of the State of Pennsylvania, and the negligence complained of and the injury inflicted occurred in the State of Pennsylvania, therefore, no right of action accrued in this state, and the court overruled said motion and the testimony offered by the plaintiff was introduced, to which holding, the defendant then and there excepted.

Thereupon, further testimony being given and the arguments of counsel to the court and jury having been proceeded with,
45 and the court having charged the jury, the jury retired and returned a verdict in favor of the plaintiff as appears of record. The above and foregoing comprises all the proceedings had in the trial of the case.

Thereupon, the defendant, within three days, made and filed its motion for a new trial, but the *cuort* overruled said motion and rendered judgment on the verdict, and the defendant excepted to said ruling of said court in overruling the motion for a new trial and in rendering judgment on the verdict and prays that this, its bill of exceptions, in that behalf might be allowed.

And the statutory time from the overruling of said motion for a new trial having been given the defendant in which to prepare, have allowed, signed and sealed this bill of exceptions, and have the same entered upon the journal of said court.

Now, within said statutory period from the overruling of said motion for a new trial, to wit, on the twenty-eighth day of July, 1904, the above bill of exceptions was placed in the hands of the clerk and filed in said action.

And now, within — days after said statutory period, to wit, on the fourth day of August, 1904, the clerk of the Court of Common Pleas transmitted said bill of exceptions, together with all amendments and objections thereto, to the trial judge.

Wherefore, the above bill of exceptions is allowed by the court, signed and sealed, and upon motion of the defendant, ordered
46 to be made a part of the record in this case.

This fourth day of August, A. D. 1904.

GEO. F. ROBINSON,
Trial Judge.

This bill filed with the clerk twenty-eight day of July, 1904.

J. HOWARD EDWARDS, *Clerk.*

Adverse party notified of the filing of this bill — day of ——, 1904. Notification waived.

Objections filed by adverse party — day of ——, 1904.

This bill transmitted to the court by the clerk this second day of August, 1904.

J. HOWARD EDWARDS, *Clerk.*

This bill received by the court fourth day of August, 1904.

GEO. F. ROBINSON,
Judge of the Court of Common Pleas.

This bill returned to the clerk by the court fourth day of August, 1904.

GEO. F. ROBINSON,
Judge of the Court of Common Pleas.

On this day, fifth day of August, 1904, this bill returned to the clerk and filed.

J. HOWARD EDWARDS,
Clerk of the Court of Common Pleas.

47 In the Supreme Court of Ohio, January Term, A. D. 1905.

THE STATE OF OHIO, *City of Columbus, ss:*

Certified Transcript of Docket and Journal Entries.

In the Record and Proceedings then and there had and held, among other things, is the following, to-wit:

#9222.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Error to the Circuit Court of Mahoning County.

Oct. 27, 1904. Petition in Error, Waiver, Circuit Court Transcript, Original Papers and Bill of Exceptions filed.
" " " Papers taken by Toothaker for Clerk. Returned.
Nov. 7, " Printed Record filed.
" 11, " Proof of Service filed.
" 14, " Motion by Defendant to Advance and Notice filed.
" 22, " Journal Entry:
"Motion by Defendant to Advance Cause No. 9222 on the General Docket."
"Ordered that said Motion be and the same is hereby allowed."
Journal No. 20, Page 68.
Jan'y 18, 1905. Plaintiff's Printed Brief filed.
" 23, " Proof of Service filed.
Apr. 17, " Defendant's Printed Brief and Proof of Service filed.
Oct. 25, " Plaintiff's Supplemental Printed Brief filed.
Oct. 31, " Journal Entry:

"This cause came on to be heard upon the transcript of the record of the Circuit Court of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court that the judgment of the said Circuit Court be and the same hereby is reversed for reasons stated in the opinion in this case. And this Court proceeding to render the judgment the Circuit Court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is reversed and the petition of said Elizabeth M. Chambers is dismissed. And it appearing to this Court that the plaintiff in error, The B. & O. R. R. Co., both on the pleadings and the conceded facts is entitled to have judgment herein, it is further ordered and adjudged by this Court that said plaintiff in error, The B. & O. R. R. Co., go hence without day and that it recover from the defendant in error, Elizabeth M. Chambers, its costs herein expended in this Court, the Circuit Court and the Court of Common Pleas, taxed at $—, and that defendant in error, Elizabeth M. Chambers, pay her own costs in each of said Courts taxed at $—, and in default thereof execution is awarded therefor.

Ordered, that a special mandate be sent the Court of Common Pleas of Mahoning County, to carry this judgment into execution.

48 Ordered, That a copy of this entry be certified to the Clerk of the Circuit Court of Mahoning County, 'for entry.'"

Journal No. 20, Page 401.

Nov. 14, 1905. Mandate Issued.
" " " Original Papers sent Clerk.
Dec. 18, " Amended Journal Entry:

"For good cause it is ordered by the Court that the judgment heretofore rendered by this Court on the 31st day of October, 1905, being a day within this Term of the Court, be, and the same hereby is corrected, modified and changed so as to read as follows: This cause came on to be heard upon the transcript of the record of the Circuit Court of Mahoning County, and was argued by counsel. On consideration whereof, it is ordered and adjudged by this Court, that the judgment of the said Circuit Court be and the same hereby is, reversed for reasons stated in the opinion in this case. It is hereby found by the Court that upon the hearing and argument of this cause in this Court, the defendant in error, by its counsel, made

the question in her brief that the statutes of this state, to-wit: Section 6134, (90 O. L. 140) and Section- 6134-2 as amended on the 6th day of May, 1902, (95 O. L. 401), requiring construction in the decision in this case and upon which the rights of the parties depended were and are in conflict with Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; and said question was made, argued and relied upon by the defendant in error and was by this Court considered and adjudged adversely to said defendant in error and adversely to the right and privilege claimed by her thereunder; that it became and was necessary to the case to determine whether said sections of said statutes of Ohio are the laws of said State of Ohio, and were, and are, of binding force and validity against the defendant in error and the right and privilege by her claimed under the provisions of the Constitution of the United States hereinbefore referred to. The Court further finds and adjudged that said Sections of the statutes of Ohio, as aforesaid, are not in violation of or repugnant to said provisions of the Constitution of the United States referred to and claimed under by said defendant in error, and finds and adjudged that said sections were and are valid and binding upon said defendant in error and prevent her from prosecuting her right of action in the courts of the State of Ohio.

And this Court proceeding to render the judgment the Circuit Court should have rendered, it is considered and adjudged that the judgment of the Court of Common Pleas be, and the same hereby is, reversed, and the petition of said Elizabeth M. Chambers is dismissed. And it appearing to this Court that the plaintiff in error, The Baltimore and Ohio Railroad Company, both on the pleadings and the conceded facts is entitled to have judgment herein, it is further ordered and adjudged by this Court that said plaintiff in error, The Baltimore & Ohio Railroad Company, go hence without day, and that it recover from the defendant in error, Elizabeth M. Chambers, its costs herein expended in this Court, the Circuit Court and the Court of Common Pleas, taxed at $—, and that defendant in error, Elizabeth M. Chambers, pay her own costs in each of said courts taxed at — Dollars, and in default thereof execution is awarded therefor.

Ordered, that a special mandate be sent the Court of Common Pleas of Mahoning County, to carry this judgment into execution.

Ordered, That a copy of this entry be certified to the Clerk of the Circuit Court of Mahoning County, 'for entry.'"

Journal No. 20, Page 450.

Dec. 19, 1905. Amended Mandate sent Clerk of Courts.

49

April 11th, 1906. Entry of Certification:

"On motion of said defendant in error, Elizabeth M. Chambers, this court in addition to the orders heretofore made herein, order it to be certified and made part of the record of this case, and of the judgment of reversal entered herein, that the defense interposed by the defendant to the cause of action of the plaintiff herein was and is founded upon Section 6134 (90 O. L. 140) and Section 6134-*a*, as amended on the 6th day of May, 1902, (95 O. L. 401) of the Revised Statutes of Ohio.

Also that said defendant in error set up, and made the question as to whether or not said sections of said statutes of Ohio were and are in conflict with Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; that said rights and privileges were claimed by her, and said question was made in argument, argued and relied upon by the defendant in error, and was by this court considered and adjudged adversely to said defendant in error and adversely to the right and privilege claimed by her thereunder; that said judgment of reversal was in favor of the validity of said sections of said statute and of such proceedings had thereunder and that they were not repugnant to said section 2 of Article 4 of the Constitution of the United States. That said defendant in error, Elizabeth M. Chambers, duly excepted to said judgment of reversal. That it became material to the determination of said case in this court to determine said question so made by said Elizabeth M. Chambers, which was determined adversely to her, as appears in the entry and judgment of reversal heretofore made herein by this court and placed upon its journal on the 18th day of December, 1905.

It is further certified that this court is the high-

est court of law or equity in the state of Ohio in which a decision can be had in this state.

JOHN A. SHAUCK,
Chief Justice, Supreme Court of Ohio."

Journal No. 21, Page 36.

April 11th, 1906. Typewritten Opinion of Supreme Court of Ohio filed.
" " " Entry of Certification filed.
" " " Petition for Writ of Error filed.
April 3rd, " Assignment of Errors filed.
April 11th, " Citation and acknowledgment of receipt of copy of citation by defendant in error filed.
" " " Bond in Duplicate filed.
" " " Order allowing Writ of Error filed.
" " " Writ of Error filed.
" " " Copy of writ of error lodged and filed for service on defendant in error.

50 Supreme Court of the State of Ohio.

STATE OF OHIO, *City of Columbus:*

I, Lawson E. Emerson, Clerk of the Supreme Court of Ohio, do hereby certify that the foregoing Typewritten Opinion of the Supreme Court of Ohio, Entry of Certification, Petition for Writ of Error, Assignment of Errors, Citation on Writ of Error and Waiver, Bond, Order Allowing Writ of Error and Writ of Error are the original papers filed in this Court in the case of The Baltimore & Ohio Railroad Company, Plaintiff in Error, *vs.* Elizabeth M. Chambers, Defendant in Error; that the printed copy of the record attached hereto is a true and correct copy of the Printed Record filed in said Supreme Court and used in the consideration of said cause, and that the foregoing Transcript of Docket and Journal Entries is truly taken and correctly copied from the records of said Corut in said Cause.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said Supreme Court this 11th day of April, A. D., 1906.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON,
Clerk Supreme Court of Ohio,
By J. G. OBERMEYRE, *Deputy.*

51

9222.

THE BALTIMORE & OHIO R. R. CO.
v.
ELIZABETH M. CHAMBERS.

Error to the Circuit Court of Mahoning County.

CREW, *J.:*

No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the state of Ohio.

Judgment reversed.

Davis, C. J., Shauck, Price and Spear, JJ., concur.

(No. 9222—Decided October 31, 1905.)

52 Suit was brought by Elizabeth M. Chambers in the court of common pleas of Mahoning county, Ohio, against the Baltimore & Ohio Railroad Company, to recover damages from said company for negligently causing the death of her husband Harry E. Chambers, who she alleged was killed on the nineteenth day of September, 1902, on the line of defendant's railroad in the state of Pennsylvania.

Plaintiff in her petition pleads certain statutes of the state of Pennsylvania and avers that under and by virtue of such statutes there accrued to her, because of the matters complained of in her petition, the right to maintain an action and recover damages in respect thereof against the defendant company in the state of Pennsylvania. She therefore claims the right to maintain such action in Ohio.

At the trial of this same cause in the court of common pleas of Mahoning county, at the May term 1904, it was admitted by the plaintiff that at the time of the grievances complained of in her petition, and for a long time prior thereto, she and her said husband Harry E. Chambers, were and had been citizens and residents of the state of Pennsylvania. On the trial of said cause the plaintiff Elizabeth M. Chambers, to maintain the issues on her part offered in evidence the depositions of J. J. Green. Thereupon and before said deposition was read, the defendant objected to the in-
53 troduction of any testimony in the case, assigning as reason therefor "that the averments of the petition do not constitute a cause of action against the defendant, and that as the plaintiff and her husband were at the time of the occurrence of the grievances complained of, citizens and residents of the state of Pennsylvania, and the negligence complained of and the injury inflicted, occurred in the state of Pennsylvania, therefore no right of action accrued

in this state." The court overruled the objection, and the testimony offered by the plaintiff was introduced, to which the defendant at the time excepted. Further testimony was offered and received over the objection of the defendant company, and after the arguments of counsel and charge of the court the case was submitted to a jury who returned a verdict in favor of the plaintiff Elizabeth M. Chambers. The defendant, the railroad company, within three days made and filed its motion for new trial, which motion was overruled by the court and judgment was entered on the verdict. Thereupon the railroad company prosecuted error to the circuit court of Mahoning county, which court affirmed the judgment of the court of common pleas. The company now brings error in this court.

Messrs. Arrel, McVey & Taylor, for plaintiff in error.

Messrs. Murray & Koonce and Messrs. W. S. Anderson & Son, for defendants in error.

54 CREW, *J.*:

The record in this case presents the question, whether the widow of a decedent who at the time of his death was neither a citizen of nor a resident in the state of Ohio, can maintain an action in the courts of this state to recover damages for his wrongful death occurring in another state, where the statutes of the state in which he was killed gives her the right to maintain such action in that state. Or differently stated, the question to be determined here is, will the courts of this state take and entertain jurisdiction of actions to recover damages for wrongful death under the statutes of a sister state, where, as in this case, the decedent and his next of kin were, at the time of the injury and death for which a recovery is sought, all citizens of, and residents in, such sister state. As appears of record in this case, the cause of action relied upon and pleaded by plaintiff in her second amended petition, is not one arising in, or founded upon any statute of, the state of Ohio; but said cause of action is one that accrued to her in the state of Pennsylvania, and is founded upon certain statutes of that state set forth and pleaded by her in said amended petition as follows:

"That by reason of the premises a right of action accrued to plaintiff upon the death of her husband, the said Harry E. Chambers, in the manner aforesaid, by the means aforesaid, under and by virtue of the act of the General Assembly of the State of Pennsylvania, approved April 15, 1851, and the act of the General Assembly of said State, approved April 26, 1855. Sections 18 and 19 of the act of April 15, 1851, are as follows:

55 "SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

"SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or

if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

Sections 1 and 2 of the act of April 26, 1855, are as follows:

"SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors."

"SEC. 2. That the declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter."

Plaintiff further says that by Sec. 21, Article 3, of the Constitution of the State of Pennsylvania, of 1874, it is provided as follows, to wit:

"SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from said injuries, the right of action shall survive and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

A comparison of the foregoing statutes, with the wrongful death statutes of our own state, independent of section 6134*a*, which is hereinafter specially considered, will disclose the fact, that although they belong to the same general class of legislation, they are nevertheless, in many of their provisions wholly unlike the Ohio statutes.

56 And while in the present case we entertain the opinion that this dissimilarity in provision is not such as of itself to defeat jurisdiction, yet the fact that such dissimilarity exists, is at least we think, worthy of note. The following are some of the points of difference. Under the Pennsylvania statute the action for causing wrongful death must be brought by the *widow*, if there be one;—under the Ohio statute (6135 R. S.) such action can only be brought by the *personal representative* of the deceased person. In Pennsylvania the action must be brought within one year from decedent's death and there is *no limit* to the amount of recovery. In Ohio (6135 R. S.) the action must be brought within two years from the death of the decedent and the amount that may be recovered is expressly limited to a sum not exceeding ten thousand dollars. Plaintiff's action in the present case being in its nature special, and one founded exclusively upon the statutes of the state of Pennsylvania, and being for a cause of action arising wholly within that state for wrongfully causing the death of a citizen of that state, even though such cause of action be held to be transitory in its nature, the only principle upon which plaintiff may invoke the jurisdiction of, or may maintain such action in the courts of this state, in the absence of express legislative permission to do so, is that of *comity*, and if her action be not sustainable upon that ground she must be held to be without right to bring or maintain the same in the courts of Ohio, for it must be conceded that the statutes of Pennsyl-

57 vania can not operate to confer upon her any such right, they being without authority or binding force beyond the territorial limits of that state.

Judge Story in his treatise on the conflict of laws, lays down as

the basis upon which all reasonings on the law of comity must necessarily rest, the following maxims: First, "that every nation possesses an exclusive sovereignty and jurisdiction within its own territory." Secondly, "that no state or nation can by its laws directly affect or bind property out of its own territory, or bind persons not resident therein whether they are natural born subjects or others." The learned judge then adds: "From these two maxims or propositions, there follows a third, and that is, that whatever force and obligation the laws of one country have in another, depend solely upon the laws and municipal regulation of the latter; that is to say, upon its own proper jurisprudence and polity, and upon its own express or tacit consent." Story on Conflict of Laws §23. And Minor in his very recent work, Conflict of Laws, page 10, §6, in discussing the exceptions to the enforcement of a foreign law in the state of the forum, says: "Few general principles of private international law are so well settled as the rule that no foreign law (even though, under ordinary circumstances it be the 'proper law') will be enforced in a sovereign state, if to enfore it will be to con-
travene the express statute law or an established policy of
58 the forum, or is injurious to its interests." The doctrine of the foregoing authorities,—and many more might be cited to the same effect,—leads to the conclusion, that an action may only be brought and maintained in a jurisdiction other than that in which the cause of action arose, when the cause of action is itself transitory, and its enforcement not inconsistent with, or obnoxious to, the laws or public policy of the jurisdiction in which the suit is brought. In other words, the law of comity, so called, is not a law of absolute obligation, and its principles can never properly be invoked in aid of the enforcement of a foreign statute, where the effect of the enforcement of such foreign statute would be, or is, to set at naught the positive law or public policy of the particular forum to which resort is had. Logically then the inquiry suggests itself in the present case, is it in harmony and accord with the laws and public policy of the state of Ohio, to permit the enforcement in the courts of this state of a cause of action arising under the wrongful death statutes of the state of Pennsylvania, in favor of the next of kin of one who at the time of his death was neither a citizen of, nor resident in the state of Ohio. Primarily, the legislature must be held to be the judge of questions of public policy, and if it has spoken plainly, either for or against the enforcement of a statute of a sister state in a given case, the courts must obey its mandate. It is well
understood that at comon law, in pursuance of the maxim
59 *actio personalis moritur cum persona,* no right of action existed in favor of the heirs, distributees, or personal representative of a deceased person, for damages for his wrongful death. The right of action which the injured person had abated with his death. This unsatisfactory state of the common law with respect to the right to recover for death due to negligence or wrongful acts, led to the passage of statutes giving a right of recovery in such cases. The earliest of these statutes was the *English* act of 1846, 9 & 10 Vict., c. 93, commonly known as Lord Campbell's act, and this

enactment has served as the model for much of the subsequent legislation on this subject, now to be found in most, if not all, of the states of the Union. Am. & Eng. Ency. of Law, vol. 8, pgs. 854 & 858. By an act of the general assembly of the state of Ohio passed March 25, 1851, (S. & C. 1139), Lord Campbell's Act was adopted into, and became a part of the legislation of this state, and the right was thereby given for the first time, in Ohio, to recover for a death caused by wrongful act, neglect or default. This statute, in the form in which it was originally enacted, was several times before this court for review, and it was uniformly held that the act gave no right of recovery in those cases where the wrongful act which caused the death, occurred outside of the state of Ohio. This court so held in Woodard *v.* Railroad Co., 10 Ohio St., 121. Hover Admr. *v.* Railroad Co., 25 Ohio St., 667. Brooks Admr. *v.* Railway Co. 53 Ohio St., 655, and Railroad Co. *v.* Fox Admr., 64
60 Ohio St., 133. In Hover Admr. *v.* Railroad Co., *supra*, the court says: "The act of March 25, 1851, (S. & C. 1139), allowing an action by the representatives of a party whose death was caused by the wrongful act of another, does not extend to cases where the wrongful act which caused the death was committed outside the state of Ohio." In Railroad Co. *v.* Fox Admr., *supra*, Spear, J., at page 141, referring to section 6134, Rev. Stat., which section differs in no essential particular, from the original act of March 25, 1851, says: "It is established law in Ohio, however, that section 6134 does not extend to wrongful acts causing death outside of this state, and that prior to the passage of section 6134*a*, Revised Statutes, no action by an administrator for such cause could be maintained in our courts." This then was the status of the law of Ohio up to, and until, the enactment of original section 6134*a*, Rev. Stat., which was passed May 21, 1894 (91 O. L. 408), and is as follows:

"Whenever death has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state, in all cases where such other state, territory or foreign country allows the enforcements in its courts of the statute of this state of a like character; but in no case shall the damages exceed the amount authorized to be recovered for a wrongful neglect or default in this state, causing death. Every action brought under this act where the death has already occurred shall be commenced within one year from the passage of this act; and in all other cases, within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country."

61 This legislation is supplementary in character and presupposes and is in effect a legislative declaration, that without it no action could be maintained in Ohio to recover damages for wrongful death occurring in another state, territory or foreign country; for if such right already existed under favor of the provision of section 6134, Revised Statutes, then section 6134*a* was a vain and useless enactment. We think therefore it must be conceded

that this statute created, and was intended to create and give, a new right of action which theretofore had no existence. But it will be observed that the right or authority thereby given, to enforce such new right of action in this state, for a death occurring in another state, is a qualified and conditional right, and is, by express provision, subject to the limitation that the courts of the state in which the death occurred shal- enforce the statute of this state of like character. In Railroad Co. *v.* Fox Admr., *supra*, this court, as we have seen, recognized, and declared the fact to be, that section 6134*a* created and gave a new right of action, and furthermore, the court in that case decided that the right of action so given could only be enforced in this state under the limitations, and upon the condition, prescribed in the statute. In the opinion in that case it is said at pages 144 and 145:

"Nor is there ground for saying that our statute, Section 6134*a*, is satisfied by the mere entertaining by the courts of another state of a cause of action for death occurring in our state. Such is not the language of the law. It is not the entertaining of the suit that is stipulated for, but enforcement of our statute of like char-
62 acter. This means that it is the law of Ohio which the sister state will enforce; not necessarily the law of that state, for where there is an essential difference, as has already been pointed out, it can not be said by enforcing their own law the court of the other state is enforcing our statute. Our statute rests upon the ground of reciprocity which is based upon the idea of comity, and the very essence of reciprocity implies that each state, as to the subject matter, shall have and enforce identical laws; not simply provisions which may be in many respects similar, but in all essential particulars the same. It seems to us clear that the laws of Indiana, while they permit the bringing of actions in the courts of that state to recover for death occurring in another state, require the determination of the rights of the parties by the provisions of their own laws, but do not enforce the laws of the state where the injury was committed."

On May 6, 1902 (95 O. L. 401) section 6134*a*, above quoted, was amended, and the original section was repealed. This amended section, which was in force at the time of the trial of this case in the court of common pleas, provides as follows:

"Whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory, or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country."

It is important to note that this amended section changes the former law in two essential particulars,—1. It dispenses with the condition that the state in which the wrongful death occurs shall enforce in its courts the statute of this state of like character. 2. It in terms limits the right therein given, to maintain an action in

this state for wrongful death occurring in another state, to actions for causing the death of *citizens* of Ohio. Whereas original section 6134*a* gave such right without limitation or restriction as to citizenship. If as contended by counsel for defendant in error in their brief herein, it was not the purpose or intent of the legis-
63 lature by this amendment to limit and restrict the right to recover in the courts of this state, for wrongful death occurring in another state, to those cases where the person killed was a citizen of Ohio; and if as they contend, "The prime object of this statute (amended section 6134*a*) was to permit the actions embraced within its terms to be brought in the courts of the state of Ohio, whether or not our statute would be enforced in the foreign state; and to give a statutory sanction to such actions, instead of allowing the same to remain subject to the law of comity," then indeed was the legislature most unfortunate in the method employed, and in the language used, to accomplish this result. If such only had been the legislative purpose, that purpose could have been much more easily and effectively accomplished, by merely omitting from original section 6134*a* the clause, "in all cases where such other state, territory or foreign country allows the enforcement in its courts of the statute of this state of a like character," and we think it but fair to presume, that had such been the sole object sought to be accomplished by the legislature, that this amendment would have taken some such form. Having regard then to the scope and effect of the provisions of the section amended, and to the especial character of the amendments made, we think it clear, that the legislature by the adoption of amended section 6134*a*, undertook, and intended thereby, to limit and restrict the right to recover in the courts of this state, for a wrongful death occurring in another state,
64 to those cases where the person killed was, at the time of his death, a citizen of Ohio. But it is contended in argument by counsel for defendant in error, that such construction and interpretation of this statute renders it unconstitutional, by putting it in conflict with section 2, article 4, of the Federal Constitution, which provides that: "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states." But the contrary is now too well established to be disputed. This constitutional provision applied to fundamental and universal rights, not to special privileges. Minor's Conflict of Law, 15. Furthermore, under this statute non-resident next of kin have equal rights, and our courts are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of the action, was at the time of his death a citizen of Ohio. It is also suggested by counsel for defendant in error, that if the courts of this state will not permit the enforcement therein, of actions for wrongful death occurring in other states, without reference to the citizenship of the person killed, that in many cases the right of recovery will be wholly lost. This does not follow, for in all cases of diverse citizenship the Federal courts are given jurisdiction and the wrong-doer may be followed to any state into which he may

go, and the right given by the state where the death occurred,
65 may there be enforced against him in the courts of the United States.

From a consideration of the statutes hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this state, that an action for wrongful death occurring in another state, will not be enforced in the courts of this state, except where the person killed was, at the time of his death, a citizen of Ohio, And we think the case at bar, aptly and forcibly illustrates, the wisdom of such a policy. In the present case, the plaintiff below, Elizabeth M. Chambers, resides in, and is a citizen of, the state of Pennsylvania; her husband, Harry E. Chambers, at the time of his injury and death, resided in and was a citizen of the state of Pennslyvania; the alleged wrongful act occurred, and the cause of action arose, in the state of Pennsylvania; the defendant below, The Baltimore & Ohio Railroad Company, then operated, now operates, its line of railroad in said state, and could have been as easily sued in that state as in Ohio. But for some reason, which we may guess, but which the record does not affirmatively disclose, plaintiff elected to bring her action in this jurisdiction as a matter of convenience, and not from necessity. To open our courts and under these circumstances, for the adjustment and settlement of the rights of the parties, is to extend an invitation to all such persons, who may, for whatsoever reason, prefer to resort to our tribunals, to
66 seek the courts of this state to enforce their claims. Thus we should greatly add to the already overburdened condition of the dockets in all our courts, and thereby make the settlement of rights originating outside the state, between citizens of other states, a charge and burden upon the people of our own state. The legislature of Ohio has, we think, by the foregoing legislation, manifestly declared that such is not the policy of this state.

It follows therefore that the judgment of the circuit court must be reversed and judgment entered for plaintiff in error upon the conceded facts.

Judgment reversed.

Davis, C. J., Schauck, Price and Spear, JJ., concur.

67 STATE OF OHIO, *City of Columbus:*

Supreme Court of the State of Ohio.

I, Lawson E. Emerson, Clerk of the Supreme Court of the State of Ohio, do hereby certify the foregoing to be a true and correct copy of the original opinion in the case of The Baltimore & Ohio Railroad Company *vs.* Elizabeth M. Chambers, as the same is on file in the Office of the Reporter of the Supreme Court of Ohio; but it is subject to revision and addition by the Judges until published in the official reports.

In witness whereof, I have hereunto set my hand and Seal of said Court this 11th day of April, A. D. 1906.

[Seal the Supreme Court of the State of Ohio.]

LAWSON E. EMERSON, *Clerk,*
By J. G. OBERMEYRE, *Depaty.*

68 [Endorsed:] 9222 Typewritten Opinion Supreme Court of Ohio B. & O. R. R. Co. *vs.* Elizabeth Chambers Filed Supreme Court of Ohio, Mar. 28 1906 L. E. Emerson, Clerk.

69 In the Supreme Court of Ohio.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Entry of Certification.

On motion of said defendant in error, Elizabeth M. Chambers, this court in addition to the orders heretofore made herein, order it to be certified and made part of the record of this case, and of the judgment of reversal entered herein, that the defense interposed by the defendant to the cause of action of the plaintiff herein was and is founded upon Section 6134 (90 O. L. 140) and Section 6134–*a*, as amended on the 6th day of May, 1902, (95 O. L. 401) of the Revised Statutes of Ohio.

Also that said defendant in error set up, and made the question as to whether or not said sections of said statutes of Ohio were and are in conflict with Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; that said rights and privileges were claimed by her, and said question was made in argument, argued and relied upon by the defendant in error, and was by this court considered and adjudged adversely to said defendant in error and adversely to the right and privilege claimed by her thereunder; that said judgment of reversal was in favor of the validity of said sections of said statute and of such proceedings had thereunder and that they were not repugnant to said section 2 of Article 4 of the Constitution of the United States. That said defendant in error, Elizabeth M. Chambers, duly excepted to said judgment of reversal. That it
70 became material to the determination of said case in this court to determine said question so made by said Elizabeth M. Chambers, which was determined adversely to her, as appears in the entry and judgment of reversal heretofore made herein by this court and placed upon its journal on the 18th day of December, 1905.

It is further certified that this court is the highest court of law or equity in the State of Ohio in which a decision can be had in this state.

JOHN A. SHAUCK,
Chief Justice, Supreme Court of Ohio.

71 [Endorsed:] In Supreme Court of Ohio. The Baltimore & Ohio Railroad Company Plaintiff in Error *vs.* Elizabeth M. Chambers, Defendant in Error. Entry of Certification. Filed Supreme Court of Ohio, April 11th 1906 L. E. Emerson, Clerk. Murray & Koonce, Attorneys at Law, Youngstown, Ohio.

72 *Petition for Writ of Error from Supreme Court of United States to Supreme Court of Ohio.*

Supreme Court of Ohio.

Case No. 9222.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

To the Hon. John M. Harlan, an Associate Justice of the Supreme Court of the United States:

Your petitioner, Elizabeth M. Chambers, respectfully shows, that heretofore, to-wit, on the 31st day of October, 1905, the Supreme Court of the State of Ohio reversed the judgment herein of the Common Pleas and Circuit Courts of Mahoning County, State of Ohio, and dismissed the petition of the said Elizabeth M. Chambers, in a certain cause wherein she was plaintiff and The Baltimore & Ohio Railroad Company was defendant, which judgment of reversal and dismissal of said petition was a final order made by the highest court of the State of Ohio; and the highest court of the State of Ohio having jurisdiction of said case, in which a decision could be had. And in which order and judgment certain errors were committed to the prejudice of said Elizabeth M. Chambers, all of which will more in detail appear from the assignment of errors which is filed with this petition.

Petitioner further represents that there was drawn in question in said cause the following matters, to-wit:

Your petitioner, as plaintiff, brought this action in the Court of Common Pleas of Mahoning County, Ohio, to recover compensation for the damages sustained by her by reason of the wrongful killing by said The Baltimore & Ohio Railroad Company of her hus-
73 band, Harry E. Chambers, while in the performance of his duties as locomotive engineer in the employ of said The Baltimore & Ohio Railroad Company in the State of Pennsylvania; that said Harry E. Chambers and said Elizabeth M. Chambers were, at the time of said wrongful killing, citizens of the State of Pennsylvania; that by reason of said wrongful killing of said Harry E. Chambers a right of action accrued to said Elizabeth M. Chambers under and by virtue of the Act of the General Assembly of the State of Pennsylvania, approved April 15, 1851, and the act of the General Assembly of said State approved April 26, 1855; that said sections 18 and 19 of the Act of April 15, 1851 are as follows:

"SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction.

"SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

That said Sections 1 and 2 of the Act of April 26, 1855 are as follows:—

"SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors.

"SEC. .2 That the declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter."

That said Elizabeth M. Chambers, as the widow of said Harry E. Chambers, is and was the only person entitled to bring said action; that no action has heretofore been brought in behalf of the injuries aforesaid, by any one in any court; and was brought within one year after the death of the said Harry E. Chambers, in the Court of Common Pleas of Mahoning County in the State of Ohio, said cause of action being transitory in its character.

That defendant, interposed as a defense to said action Section 6134 (90 Ohio Laws, 140) and Section 6134–*a*, as amended
74 on the 6th day of May, 1902, (95 Ohio Laws, 401) of the Revised Statutes of Ohio, alleging that by virtue of the provisions of said statutes, Elizabeth M. Chambers, had no right to prosecute her action, accruing under the statutes of the state of Pennsylvania, in the Courts of the State of Ohio, and that no action can be maintained in the Courts of said state of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of said State of Ohio. That said Elizabeth M. Chambers contended against this defense that said statutory provisions of the state of Ohio, if they have application to her rights and those sought by her to be enforced in this action, are in contravention of Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states. And thereupon the case was tried in the Court of Common Pleas of Mahoning County in said State of Ohio to a judge, then and there presiding as the trial judge of said court, and to a jury, and the jury after the submission of the evidence on the part of the parties, found the issues in favor of the said Elizabeth M. Chambers, and assessed her damages in the sum of Three Thousand Dollars, upon which finding of said jury said judgment was entered by said Court of Common Pleas; and thereupon

the Circuit Court of Mahoning County, in said State of Ohio, took jurisdiction of said case and tried the case brought into said court by proceeding in error, and found and entered upon its journal a judgment affirming the judgment of the Court of Common Pleas rendered as aforesaid; and thereupon error was prosecuted to said Circuit Court from said Supreme Court of Ohio and said finding and
75 judgment so rendered by said Circuit Court was reversed by said Supreme Court of Ohio. That there was in all of said courts drawn in question the validity of said Section 6134 (90 Ohio Laws 140), and Section 6134–*a*, as amended on the 6th day of May, 1902, (95 Ohio Laws, 401), of the Revised Statutes of Ohio, on the ground of their being repugnant to the Constitution of the United States, as hereinbefore set forth, and the decision of said Supreme Court of Ohio, denying the right to maintain said action, as hereinbefore set forth, is in favor of the validity of said statute.

Petitioner further says that a federal question was made in said case, to-wit, as hereinbefore set out, that said judgment of said Supreme Court of Ohio, was repugnant to the constitution of the United States, in the respects hereinbefore referred to; and that a decision of said Federal question was necessary to the judgment so rendered by said Supreme Court of Ohio, and your petitioner claims by reason of the premises the right to remove said judgment to the Supreme Court of the United States by writ of error under Section 709 of the Revised Statutes of the United States.

Your petitioner files herewith her assignment of errors.

Wherefore your petitioner presents herewith an exemplified transcript of the record of the Supreme Court of Ohio in said case and prays that a writ of error to said Supreme Court of Ohio be allowed; that citation be granted and signed; that the bond herewith presented be approved, and that the errors complained of may be reviewed in the Supreme Court of the United States and the
76 judgment aforesaid of said Supreme Court of Ohio be reversed, vacated and held for naught, and that she may be restored to all things that she has lost by reason of said final judgment.

ELIZABETH M. CHAMBERS, *Petitioner,*
By CHARLES KOONCE, JR.,
ROBERT B. MURRAY &
WILLIAM S. ANDERSON,
Her Attorneys.

The writ of error as prayed for in the foregoing petition is hereby allowed this 5th day of April, A. D. 1906, and the bond is hereby fixed at the sum of Three Hundred ($300.00) Dollars.

Dated at Washington, D. C., this 5th day of April, A. D. 1906.

JOHN M. HARLAN,
An Associate Justice of the Supreme Court of the United States.

77 [Endorsed:] # 9222. In Supreme Court of Ohio. The Baltimore & Ohio Railroad Company, Plaintiff in Error, *vs.*

Elizabeth M. Chambers, Defendant in Error. Petition for Writ of Error from Supreme Court of United States to Supreme Court of Ohio. Filed, Supreme Court of Ohio April 11th 1906 L. E. Emerson Clerk. Charles Koonce, Jr., Attorney at Law, Youngstown, Ohio.

78 In the Supreme Court of Ohio.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Assignment of Errors on Writ of Error from the Supreme Court of the United States to the Supreme Court of Ohio.

Now comes Elizabeth M. Chambers, defendant in error, and files the following assignment of errors, which, she alleges, intervened to her prejudice in the proceedings had, and the judgment rendered by the Supreme Court of Ohio, on the 31st day of October, A. D. 1905, to which she duly excepted.

First. That said judgment of said Supreme Court of Ohio reversing the judgment rendered in her favor by the Court of Common Pleas and Circuit Court of Mahoning County, Ohio, and dismissing her petition, violates in effect, and is repugnant to, Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Second. That said Supreme Court of Ohio erred in finding and adjudging that Section 6134 (90 Ohio Laws 140) and Section 6134*a* as amended on the 6th day of May, 1902, (95 Ohio Laws 401) under the construction given thereto by said Supreme Court of Ohio, (said construction being that no action can be maintained in the courts of the said State of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the State of Ohio), were not in contravention of, and repugnant to said Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is pro-

79 vided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

Third. That by the Record in this case it appears that the judgment aforesaid given by said Supreme Court of Ohio, reversing the judgment rendered by the Circuit Court and Court of Common Pleas, of the County of Mahoning and State of Ohio, was given for the said Baltimore & Ohio Railroad Company against the said Elizabeth M. Chambers, whereas, by the law of the land, and particularly by the rights and privileges guaranteed to said Elizabeth M. Chambers by that part of section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided that the citizens of each state shall be entitled to all privileges and immunities of the citizens in the several states, the said judgment ought to have been given for the said Elizabeth M. Chambers against said The

Baltimore & Ohio Railroad Company; and the said Elizabeth M. Chambers, a citizen of the state of Pennsylvania, should have been held to have had the right and privilege to institute and maintain her said cause of action in the courts of the State of Ohio, the citizens of said State of Ohio, being entitled to said privilege.

Wherefore said Elizabeth M. Chambers prays that said judgment against her may be reversed, annulled, and held for naught, and that she may be restored to all things which she has lost by reason of said judgment.

CHARLES KOONCE, JR.,
R. B. MURRAY,
W. S. ANDERSON,
Attorneys for Elizabeth M. Chambers.

80 [Endorsed:] In the Supreme Court of Ohio. The Baltimore & Ohio Railroad Company, Plaintiff in Error, *vs.* Elizabeth M. Chambers, Defendant in Error. Assignment of errors, on writ of error from the Supreme Court of the United States to the Supreme Court of Ohio. Filed Supreme Court of Ohio April 3, 1906. L. E. Emerson, Clerk. Murray & Koonce, Attorney at Law, Youngstown, Ohio.

81 In the Supreme Court of Ohio.

THE BALTIMORE & OHIO RAILROAD COMPANY, Plaintiff in Error,
vs.
ELIZABETH M. CHAMBERS, Defendant in Error.

Bond on Writ of Error from the Supreme Court of United States to the Supreme Court of Ohio.

(Bond Executed in Duplicate.)

Know all men by these presents That We, Elizabeth M. Chambers, and Charles Koonce, Jr., Robert B. Murray, and William S. Anderson, as sureties, are held and firmly bound unto the Baltimore & Ohio Railroad Company in the full and just sum of Three Hundred ($300.00) Dollars to be paid to the said The Baltimore & Ohio Railroad Company, its successors or assigns; to the payment of which, well and truly to be made, we bind ourselves, executors and administrators, jointly and severally by these presents.

Sealed with our seals, and dated this 22nd day of March, A. D. 1906.

Whereas the above named defendant in error, Elizabeth M. Chambers, hath procured a writ of error from the Supreme Court of the United States to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Ohio.

Now, therefore, the condition of this obligation is such that if the herewith named defendant in error shall prosecute her writ or error

82 to effect and answer all costs and damages if she shall fail to make good her plea, then this obligation shall be void; otherwise to remain in full force and effect.

ELIZABETH M. CHAMBERS. [SEAL.]
CHARLES KOONCE, JR. [SEAL.]
ROBERT B. MURRAY. [SEAL.]
WILLIAM S. ANDERSON. [SEAL.]

I hereby certify that the foregoing signers of said bond are good for the amount named in the bond.

[Seal Court of Common Pleas, Mahoning County, Ohio.]

J. HOWARD EDWARDS,
Clerk of Courts of Mahoning County, Ohio.

I hereby approve the foregoing bond and sureties this 26th day of March, A. D. 1906.

JOHN A. SHAUCK,
Chief Justice of the Supreme Court of the State of Ohio.

Approved April 5th.
JOHN M. HARLAN,
Associate Justice of the Supreme Court of the United States.

April 5th, 1906.

83 [Endorsed:] In the Supreme Court of Ohio. The Baltimore & Ohio Railroad Company, Plaintiff in Error, *vs.* Elizabeth M. Chambers, Defendant in Error. Bond on Writ of Error from the Supreme Court of United States to the Supreme Court of Ohio. (Bond Executed in Duplicate.) Filed Supreme Court of Ohio April 11th, 1906. L. E. Emerson, Clerk. Murray & Koonce, Attorney at Law, Youngstown, Ohio.

Endorsed on cover: File No. 20,198. Ohio supreme court. Term No. 255. Elizabeth M. Chambers, plaintiff in error, *vs.* The Baltimore & Ohio Railroad Company. Filed April 16th, 1906. File No. 20,198.

Office Supreme Court, U. S.
FILED.
OCT 17 1907
JAMES H. McKENNEY,

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1907.

No. 22.

ELIZABETH M. CHAMBERS, PLAINTIFF IN ERROR,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.

ADDITIONAL AUTHORITIES FOR PLAINTIFF IN ERROR.

Plaintiff in error cites the following authorities in addition to those heretofore cited in the opening brief:

I. To be placed in brief at top of page 24:
R. R. Co. vs. Heilman, 58 O. S., 408.

II. On the question that this court has jurisdiction to review this case:
Davey Co. vs. Ohio, 183 U. S., 238-242.
Ry. Co. vs. Elliott, 184 U. S., 530-533-534.
Bank vs. Wehrman, 202 U. S., 295-299.
Rector vs. Bank, 200 U. S., 405-412.
Packet Co. vs. Bay, 200 U. S., 179-282.

CHARLES KOONCE, JR.,
Counsel for the Plaintiff in Error.

No. 22.

IN THE

Supreme Court of the United States

No. 22,102

ELIZABETH M. CHOMBERLAIN,

Plaintiff in Error,

vs.

THE BALTIMORE AND OHIO RAILROAD COMPANY,

Defendant in Error.

Brief for Defendant in Error.

In the Supreme Court of the United States

ELIZABETH M. CHAMBERS
Plaintiff in Error.

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY.
Defendant in Error.

BRIEF FOR

DEFENDANT IN ERROR

The original action was brought in the Court of Common Pleas of Mahoning County, Ohio, by the plaintiff in error against the defendant in error, to recover compensation for the wrongful death of Harry E. Chambers, husband of plaintiff in error. Upon proper pleadings, and in the due course of legal procedure, the action was tried in that court to a jury, and the trial resulted in a verdict and final judgment in favor of the plaintiff in error in the sum of $3,000.00, and her costs of the action. That final judgment was reviewed, and in all respects affirmed in an error proceeding duly commenced and prosecuted in the Circuit Court of Mahoning County. These judgments were reviewed and reversed, and the original action was dismissed by the Supreme Court of the State of Ohio, in an error proceeding properly instituted in that court by the defendant in error against the plaintiff in error, and this is a writ of error to the Supreme Court of Ohio to review the final judgment of that court reversing the judgments of the lower State Courts and dismissing the original action.

Harry E. Chambers (the husband of the plaintiff in error) was killed in a railroad accident in the State of Pennsylvania while he was in the employ of The Baltimore & Ohio Railroad Company in that State, and as his widow and only heir at law

she sought, in the original action, to enforce in the courts of Ohio, her right under the statutes and laws of Pennsylvania, to compensation for his wrongful death. At the time of the accident, which resulted in his death, both he and she were, and for some considerable time prior thereto, had been, citizens and residents of the State of Pennsylvania.

On the 6th day of May, 1902, (95 O. L. 401) the General Assembly of Ohio amended section 6174a of the statutes of the State so as to read as follows:

> "Whenever the death of a citizen of this State has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory, or foreign country," and repealed the original section.

In construing this amended section of the Revised Statutes of Ohio the Supreme Court of the State held: That

> "No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the State of Ohio."

The Baltimore & Ohio R. R. Co. vs. Chambers, 73 O. S. 16.

The first question we suggest, and to which we invite attention as arising upon this record, is whether or not this court, on this writ of error, has jurisdiction to review the final judgment of the Supreme Court of Ohio. If such jurisdiction exists it is confererd by section 709 of the United States Revised Statutes. That section, as amended February 5, 1867, reads as follows:

> "Section 709. A final judgment or decree in any suit in the highest court of a state, in which a decision in the suit could be had, where is drawn in question the validity of a treaty or statute of or an authority exercised under, the United States, and the

decision is against their validity; or where is drawn in question, the validity of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution, treaties, or laws, of the United States, and the decision is in favor of their validity; or where any title, right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under, the United States, and the decision is against the title, right, privilege, or immunity specially set up or claimed, by either party, under such Constitution, treaty, statute, commission, or authority, may be re-examined and reversed or affirmed in the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States."

"The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, at their discretion, award execution, or remand the same to the court from which it was removed by the writ."

This section confers jurisdiction upon this court upon a writ of error, to re-examine, reverse or affirm the final judgment of the highest court of State in three classes of cases: First, where is drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision is against their validity; second, where is drawn in question the validity of a statute of, or an authority exercised under, any State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of their validity; and, third, where any title right, privilege, or immunity is claimed under the Constitution, or any treaty or statute of, or commission held or authority exercised under the United States, and the decision is against the treaty, right, privilege, or immunity *specially set up or claimed* (the italics are ours) by either party, under such Constitution, treaty, statute, commission or authority. The case at bar falls within the third of these three classes, if it is comprehended within any of them. Where a case falls within either the first

or second class that we find in this section 709, and a Federal question appears in the record, and was decided by the State Supreme Court, or if its decision was necessarily involved in the case, and that case could not have been determined without deciding such Federal question, then this court has jurisdiction to review the final judgment of the State Court, even though the Federal question was not specially set up and claimed; but where the case falls within the third class defined in this section, then the Federal right, title, privilege or immunity must be specially set up or claimed, in order to give this court jurisdiction to review the final judgment of the State Supreme Court. There may be some rare exceptions to this rule. The distinction between cases falling within the first and second classes, and those falling within the third class have been fully and frequently recognized and enforced by this court.

In F. G. Oxley Stave Co. et al. vs. County of Butler, etc. 166 U. S. pg. 648, this court held that the averments of the Federal question to give jurisdiction to this court to review a judgment of the State court, must be so distinct and positive as to place it beyond question that the parties bringing the case from the State court to this court intended to assert a Federal right. In the opinion in this case several former cases decided by this court are reviewed.

In Sayward vs. Denney, 158, U. S. 180, 183, 184, 186, it was stated by Chief Justice Fuller in delivering the opinion of this court that certain propositions must be regarded as settled, among which were, that

> "The title, right, privilege or immunity must be specially set up and claimed at the proper time and in the proper way," and that "the right on which the the party relies must have been called to the attention of the court in some proper way, and the decision of the court must have been against the right claimed."

In Columbia Water Power Co. vs. Columbia Electric Street Railway, Light & Power Co., 172, U. S. 475, Mr. Justice Brown, in delivering the opinion of the court, says:

"There is no doubt that under the third class the Federal right, title, privilege, or immunity must be, with possibly some rare exceptions, specially set up or claimed to give this court jurisdiction.

"But where the validity of a treaty or statute of the United States is raised, and the decision is against it, or the validity of a state statute is drawn in question, and the decision is in favor of its validity, this court has repeatedly held that, if the Federal question appears in the record and was decided, or such decision was necessarily involved in the case, and the case could not have been determined without deciding such question, the fact that it was not specially set up and claimed is not conclusive against a review of such question here."

In Home for Incurables vs. City of New York, 187, U. S., 153, this court held that a judgment of a State Court could not be reviewed in this court on the grounds that it denied a right, title, privilege or immunity secured by the Federal Constitution, where it does not appear on the face of the record that such right, title, privilege or immunity was specially set up or claimed in the state court. It was also held in this case that a certificate of the chief judge of the highest state court that a Federal question was involved is not properly a part of the record and is insufficient in itself to confer jurisdiction on this court to review a judgment of the state court, or to determine Federal questions which do not appear from the record to have been brought to the attention of the state court.

In Mutual Life Insurance Company of New York vs. Alphonsine McGrew, 188 U. S., 742, this court again considered the question of how and when a Federal question should be raised in the state courts in order to give this court jurisdiction on a writ of error to review the final judgment of the highest court in a state. In reference to the third class of cases defined in section 709, and in delivering the opinion of this court in that case, Mr. Chief Justice Fuller said:

"Our jurisdiction of this writ of error is asserted under the third of the classes of cases enumerated in Sec. 709 (U. S. Comp. Stat. 1901, p. 575), and it is

thoroughly settled, that in order to maintain it, the right, title, privilege or immunity relied on must not only be specially set up or claimed, but at the proper time and in the proper way.

The proper time is in the trial court whenever that is required by the state practice, in accordance with which the highest court of a state will not revise the judgment of the court below on questions not therein raised.

"The proper way is by pleading, motion, exception or other action, part, or being made part of the record, showing that the claim was presented to the court."

In Hooker vs. City of Los Angeles, 188 U. S. 314, this
314. subject was again in some of its aspects considered by this court, and in that case it was determined that a judgment of a state court in condemnation proceedings is not reviewable in this court, on the theory that a question respecting due process of law was decided thereby, where there is nothing in the record which properly shows that the state court was led to suppose that any claim was made under the Constitution of the United States, or that any ruling involved a decision against a right set up under that instrument. These cases we deem quite sufficient to establish the rule that where any title, right, privilege or immunity is claimed under the Federal Constitution, the same must be "specially set up or claimed" in the state court, in order that this court may have jurisdiction under section 709, to review or examine the final judgment of the State Supreme Court, and that this court must be able to determine from the record sent up from the State Supreme Court that such right, title, privilege or immunity was specially set up or claimed in the State courts, and that this last question will be determined by this court alone from an inspection of the record.

As we understand the claim of the plaintiff in error it is, that she was entitled under section 2, article 4 of the Federal Constitution, to bring and prosecute to final judgment in the courts of Ohio, her action to recover compensation for the wrongful death of her husband, Harry E. Chambers, notwith-

standing the fact that he, at the time of his death, was a citizen and resident of the State of Pennsylvania, and that that right was denied her by the Supreme Court of Ohio. That section of the Federal Constitution reads as follows:

> "The citizens of each state shall be entitled to all privileges and immunities of citizens in the several States."

Assuming that the right of a citizen of one State to bring and prosecute an action to final judgment in the courts of another state is a privilege or immunity within the purview and meaning of that section of the Federal Constitution above quoted, then such right clearly falls within the third class of cases enumerated and defined in section 709, conferring jurisdiction on this court to review the final judgment of a State Supreme Court. If this be so, we must turn to the record as sent up, and from an examination of it determine whether or not this right, as a privilege or immunity, was seasonably and substantially set up or claimed by her in the State courts, or any one of them.

In the court of original jurisdiction the action was tried on the second amended petition filed in that court on January 11, 1904, and that second amended petition is set out in the printed record, commencing on page 14, and ending on page 20. In that pleading there certainly is neither hint nor suggestion that the plaintiff in error was either claiming, or asserting the right under the above quoted section of the Federal Constitution, to bring and prosecute to final judgment her action in the courts of Ohio inasmuch as it appeared upon the face of the petition that the decedent was not a citizen of Ohio, but was a citizen of Pennsylvania.

On January 27, 1904, the defendant filed in that court, to the second amended petition, a general demurrer which, on April 1st, 1904, was overruled, and the defendant took its exception. (P. R. 8-10.) Clearly, this demurrer should have been sustained under the final holding of the Supreme Court of the State, on the ground that the petition did not state facts sufficient to constitute a cause of action against the company.

On the trial of the action, and before any testimony was given, the defendant moved the court to dismiss the action, and with a direction by the court that the jury return a verdict for the defendant, on the ground that the plaintiff was not entitled, under the allegations of the amended petition, to bring her action in Ohio, and this motion was overruled by the court, and the defendant took its exception (P. R. 11.).

Again, from the bill of exceptions (P. R. 21) it was admitted in open court by the plaintiff that at the time of the grievance of which she made complaint in her petition, and for a long time prior thereto, she and her husband, Harry E. Chambers were, and had been citizens and residents of the State of Pennsylvania, and thereupon (P. R. 22), the defendant objected to the introduction of any testimony, for the reason that the averments of the petition do not constitute a cause of action against the defendant, and that as the plaintiff and the decedent at the time of the occurrence of which complaint was made, were citizens and residents of the State of Pennsylvania, and that the negligence and the injury inflicted, occurred in that state, and that therefore, no right of action could be enforced in this state, but the court overruled the objection and the trial proceeded, the defendant taking its exception. After verdict the defendant moved for a new trial on two grounds: First, the court erred in overruling the demurrer to the second amended petition; second, the court erred in refusing to sustain the motion of the defendant to direct a verdict for the defendant. (P. R. 21.) This motion was overruled, and final judgment was rendered upon the verdict. (P. R. 11). In the Circuit Court error was assigned upon these rulings of the Court of Common Pleas (P. R. 3-4), but that court affirmed in all respects the judgment of the Common Pleas (P. R. 5-6). In the Supreme Court of the State, the defendant in error, in its petition in error therein filed, assigned as error these rulings of the lower courts (P. R. 3-4-5), and as hereinabove stated, that court reversed their judgments, and dismissed the original action.

From a perusal of the pages of the printed record, cited *supra, it* will be perceived that the company at every turn in the progress of the trial in the Common Pleas Court, and in the error proceeding in the Circuit Court, was claiming that Mrs. Chambers could not maintain her action in the courts of Ohio, because of the act of the General Assembly hereinabove quoted; and it will also be perceived that up to this point in the record, there is neither hint nor suggestion, on her part, of a right to maintain her action in Ohio under any provision of the Federal Constitution. Under the statutes of, and the practice in Ohio, the demurrer and these motions raised the question of her right to maintain her action upon the admitted facts, in the courts of Ohio, and the defendant, by answering, after the demurrer was overruled, did not waive the question. (Sections 5055, 5062, and 5063 of Revised Statutes of Ohio.) Of these statutes this court takes judicial notice.

Michael Hanley et al. vs. Charles Donoghue, 116 U. S. 1.

Until the opinion of the Supreme Court of the State was handed down, there is absolutely nothing in the record to show that the defendant in error specially set up or claimed her right, if she had such right, under the quoted section of the Federal Constitution, to bring and prosecute her action to final judgment in the courts of Ohio, and as to the effect of what appears in the record in the Supreme Court, we will consider a little later.

It has been suggested, and may be again, that Mrs. Chambers had no opportunity to either specially set up, or specially claim her right under the quoted section of the Federal Constitution, to bring and maintain her action in Ohio, until the question arose and was decided in the Supreme Court, because it was not alleged in the lower courts, so far as the record discloses, and that those courts affirmed her right to so bring and prosecute her action. In reply to this suggestion, if it shall be here made, our contention is, that she not only could, but that it was necessary for her to, assert in her second amended petition on which the action was tried, her right to maintain her

action in the courts of Ohio, in order to state a cause of action against the company. In the absence of an averment in her petition specially setting up and claiming such right, no cause of action was stated, and the petition was therefore, demurrable.

Coming now to what transpired in the Supreme Court of the State, as disclosed by the record, let us examine and see whether or not that is sufficient to confer jurisdiction upon this court to review the final judgment of that court. We find in the printed record (pages 28, 29, 30, 31, 32, 33, 34, and 35), what purports to be, and doubtless is, a correct copy of the opinion of Judge Crew, delivered in the case, and he says (P. R. 34):

> "But it is contended in argument by counsel for defendant in error, that such construction and interpretation of this statute renders it unconstitutional by putting it in conflict with section 2, article 4, of the Federal Constitution, which provides that: 'The citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.' But the contrary is now too well established to be disputed. This constitutional provision applied to fundamental and universal rights, not to special privileges. Minor's Conflict of Law, 15. Furthermore, under the statute non-resident next of kin have equal rights, and our courts are qually open to them, as to resident next to kin, provided only that the person whose wrongful death is the subject of the action, was at the time of his death a citizen of Ohio."

Outside of what is said in the opinion, it could not be discovered, except by inference, that any right under the Federal Constitution had been set up or claimed in that court, and in Ohio, the syllabus, and not the opinion, contains the law of the case as settled and determined by the court. (Section 439 R. S. of Ohio, and Rule 6, 73 O. S. 10-11). Indeed, almost the entire opinion is devoted to placing a construction upon the act of May 6, 1902, or section 6134a Revised Statutes of Ohio above quoted, and to determining the question of the public policy of the state, as declared by the General Assembly and the Supreme Court of the State, in reference to the maintenance of

actions in the courts of the state, to recover compensation for a wrongful death occurring outside of the State. Moreover, we do not understand that this opinion, by any statute or rule of practice in Ohio, becomes a part of the record. We, however, are not unmindful of the fact that there is a rule of this court which makes it a part of the record in this court. It would hardly seem that such rule of this court can make the opinion the law of the case, when a rule of the Supreme Court of Ohio, says in substance or effect that it is not the law of the case, but that the syllabus is. We also find in the (P. R. 24, 25, and 26) an amended Journal entry, which contains certain findings. From this entry it doubtless will be claimed that it appears that this right in question was specially set up and claimed in the Supreme Court by Mrs. Chambers, and that that court denied the right to her. It will be noted that the first entry (P. R. 24), makes no reference to any such right as having been specially set up or claimed. The amended Journal Entry, after reversing the judgment of the Circuit Court for reasons stated in the opinion, proceeds and finds that in the hearing and argument of the cause in that court, the defendant in error made the question in her brief.

> "That the statutes of this state, towit, section 6134 (90 O. L. 140) and section 6134-2 as amended on the 6th day of May, 1902, (95 O. L. 401), requiring construction in the decision in this case and upon which the rights of the parties depended were and are in conflict with section 2, of article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states; and said question was made, argued and relied upon by the defendant in error, and was by this court considered and adjudged adversely to said defendant in error and adversely to the right and privilege claimed by her thereunder; that it became and was necessary to the case to determine whether said sections of said statutes of Ohio are the laws of said State of Ohio, and were, and are, of binding force and validity against the defendant in

error and the right and privilege by her claimed under the provisions of the Constitution of the United States hereinbefore referred to. The court further finds and adjudged that said sections of the statutes of Ohio, as aforesaid, are not in violation of or repugnant to said provisions of the Constitution of the United States referred to and claimed under by said defendant in error, and finds and adjudged that said sections were and are valid and binding upon said defendant in error and prevent her from prosecuting her right of action in the courts of the State of Ohio."

In this Journal Entry is found the first mention of any claim on the part of the plaintiff in error that she was, or had been, denied any right to which she was entitled under the Federal Constitution. As the record came into the Supreme Court, there was in it, as already pointed out, neither hint nor suggestion that she had been denied, or that she had claimed any right under that Constitution. It will be observed that in this Journal Entry the court finds that in the brief filed in the case in that court, the plaintiff in error by her counsel made the question, and that the question was made, argued and relied upon, and was considered by the court and adjudged adversely to Mrs. Chambers, and adversely to the right and privilege claimed, and also that it became, and was, necessary to the case to determine whether the Ohio statute in question was the law of the state. Is this sufficient to constitue a compliance wih th Act of Congress conferring jurisdiction on this court to review the final judgment of the Supreme Court of the State, when that act provides, and requires, that the privilege or immunity in question should be specially set out or claimed. It appears that the court, incidentally, and without the question being brought before it in any pleading, found and determined that the act in question of the General Assembly of Ohio, was not in conflict with this particular section of the Federal Constitution, and that Mrs. Chambers was not denied any right, privilege or immunity under the section in question of that Constitution. It would seem that a reviewing court should not be permitted to go outside the record to consider and determine

questions presented only in the brief of the counsel for one of the parties. It goes without saying that this brief is no part of the record, either in this court or the Supreme Court of Ohio. In addition to the above, as showing from the record that this alleged privilege or immunity was specially set up, or claimed, we have the certificate of the Chief Justice of the Supreme Court of Ohio. This certificate is somewhat peculiar in form. It purports in part to be an order of the Supreme Court of Ohio, when the record of that court discloses no such order made. If the court had ordered any such certificate to be made, its record certainly would show that fact. Furthermore, it is quite clear, and this court has so determined that the certificate of the Chief Justice of the Supreme Court of Ohio certifying that this right, privilege or immunity was specially set up or claimed, it not sufficient alone to give this court jurisdiction.

Home for incurables vs. City of New York, 187 U. S. 155, cited *supra.* 187 U.

True, this court may look at the certificate, and under some circumstances will attach to it considerable weight, but, after all, this court will determine the question of jurisdiction for itself from an inspection of the record as sent up from the State Supreme Court.

We have now called attention to all parts of the record as we read it, which in any way tends to show that this alleged right under the Federal Constitution was specially set up or claimed in any of the State Courts, and if this court, from the whole record, shall determine that such right was specially set up or claimed, then this court has jurisdiction on this writ of error to review the final judgment of the Supreme Court of Ohio, otherwise, we think, no such jurisdiction exists.

Assuming that this court has jurisdiction to review the final judgment in question of the Supreme Court of Ohio, the inquiry is, whether or not that court denied to her any right, privilege or immunity secured to her by that provision of the Constitution, which provides that citizens of each state shall be entitled to all the privileges and immunities of citizens of the

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several states. It will be noted that the act in question of May 6th, 1902, provides that whenever the death of a citizen of this state has been caused by wrongful act in another state, territory or foreign country, for which wrongful act a right to maintain an action and recover damages, is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state. This statute creates no discrimination between the citizens of Ohio and citizens of any other state. Under its provisions it is only essential to the maintenance of the action to enforce the right in the courts of Ohio, that the decedent shall have been, at the time of his death, a citizen of Ohio. If the beneficiary under the statute of the state, giving the right, and in which the wrongful act took place, and the death resulted, happens to be a citizen of Ohio, the right secured by the statute could not be enforced in the courts of Ohio. If then, in order to offend against this provision of the Federal Constitution it is necessary that the statute shall discriminate, there is clearly no offense in this act of the General Assembly of Ohio.

In Paul vs. Virginia, 8 Wallace 180, this court said, the privileges and immunities secured to citizens of each state in the several states by the provisions in question are those privileges and immunities which are common to the citizens in the latter states under their Constitution and laws by virtue of their being citizens.

In Slaughter-House Cases, 83 U. S. 394 (L. Co. Ed.), Mr. Justice Miller, after quoting the above, says:

> "The constitutional provision there alluded to did not create those rights, which it called privileges and immunities of citizens of the States. It threw around them in that clause no security for the citizen of the State in which they were claimed or exercised. Nor did it profess to control the power of the state governments over the rights of its own citizens.
>
> Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise,

> the same, neither more nor less, shall be the measure of the rights of citizens of other states within your jurisdiction."

This would seem to indicate, if not definitely decide, that unless an act of the State Legislature in fact, and in some way discriminates as to the right in question between its citizens and citizens of another state, that such act does not offend against this provision in the Federal Constitution. If this be the correct rule, then this act of the General Assembly of Ohio is not open to the Constitutional objection suggested, because, under it citizens of Ohio and citizens of every other state in the Union are treated exactly alike. True, the right to maintain the action in the courts of Ohio is made to depend in part upon the fact that the decedent at the time of his wrongful death was a citizen of Ohio, but such fact does not in any wise tend to show discrimination between or among beneficiaries, no matter where they may reside, or of what state or states they may be citizens. Clearly, the act is open to no constitutional objection under either the State or Federal Constitution, on the ground that it provides that an action may be maintained in the courts of Ohio for the wrongful death of one of its citizens, if the statutory law of the state in which he came to his death by wrongful act gives a right of such action. In other words, the act is free from objection in so far as it relates to the death of a citizen of Ohio. It is only objectionable, if at all, when applied to the maintenance of an action in the courts of Ohio for the wrongful death of a citizen of another state. Can it be possible that by this provision of the Federal Constitution, the Legislature of Ohio is inhibited from providing that where a citizen of another state meets his death by wrongful act in the state of which he is a citizen, that an action to recover compensation for his death cannot be maintained in the courts of Ohio? We think not.

Again, in deciding this case in the Supreme Court of Ohio, Judge Crew, in his opinion, pretty clearly determines and establishes the public policy of Ohio upon this subject, and this public policy, so determined and established, is clearly the re-

sult, not only of legislative enactment, but of judicial decision. Is not this a subject upon which a State by its legislative and judicial departments may establish its own public policy? It would seem from the decisions of this court that a state may so establish and enforce its own public policy. Upon this subject, in Texas and Pacific Railway Company vs. Ida May Cox, (145 U. S. 829), Mr. Chief Justice Fuller, in delivering the opinion of this court, said:

> "The statutes of these two states on this subject are not essentially dissimilar, and it cannot be successfully asserted that the maintenance of jurisdiction is opposed to a settled public policy of the State of Texas."

In Stuart's Administrator vs. The Baltimore & Ohio Railroad Company (168 U. S. 445), this court seems to maintain the same doctrine. True, in the case last above cited, this court reviewed the statutes of the District of Columbia, and also the statutes of the state of Maryland, relating to the subject, and pointed out differences between the two, and found therein no substantial differences, and therefore concluded that the action could be maintained, but in neither of the cases, last above cited, was there any statute declaring that the public policy of the State of Texas in one, and the District of Columbia in the other, was against the maintenance of the action. It would seem that, if a state can have a public policy against the right, and therefore could have a public policy against the maintenance of an action to enforce the right, it could also have a public policy against the maintenance of an action in its courts to enforce the right, even though its statutes conferred a right of action, and was similar to that of the state in which the death occurred. Moreover, the opinion of the court in the Stewart case, above cited, seems to proceed upon the theory that the so-called death statutes of the various states simply take away a common law obstacle to a recovery for a tort, and the court goes on to say, "It would seem not unreasonable to hold that an action for that tort can be maintained in any State in which that common law obstacle has been removed;

at least it has been held by this court in repeated cases, that an action for such a tort can be maintained where the statute of the State in which the cause of action arose, is not in substance inconsistent with the statute or public policy of the State in which the right of action is sought to be enforced." If we analyze this Ohio statute in the light of the opinion just quoted, it will be evident to the court that it is the policy of the State of Ohio, as indicated by this statute, to remove the common law obstacle to a recovery, only to a certain and limited extent; that is, the obstacle is removed in the case of all persons killed within the State of Ohio, and in the case of all citizens of the State, who meet death elsewhere, and to that extent, the bar to a recovery is removed by our statute. It is the policy of the State of Ohio, that the obstacle which the common law presents to the enforcement of a claim for death, shall not be removed, and it has not been removed by statute so as to include the citizens of other states, who are killed elsewhere. The public policy of the State of Ohio is therefore opposed to, and radically in conflict with the public policy of any other state which has entirely removed the common law obstacle to a recovery, and which is not limited to affording the right to its citizens only.

If then, a foreign statute may not be enforced in a State whose policy is directly opposed to the policy of the State wherein the death occurred, we think that, under the doctrine of the Stewart case and other cases in this supreme court, no privilege or immunity has been denied to this citizen of the State of Pennsylvania.

Without pursuing this subject further, we insist—First, That this writ of error be dismissed, because of a want of jurisdiction in this court on this record to review the final judgment of the supreme court of the State of Ohio; and, Second, That if such jurisdiction exists, the final judgment of the supreme court of Ohio, should be affirmed.

The above is respectfully submitted.

James F. Wilson, John G. Wilson
Carl Wilson, Harrington

Attorney for Defendant in Error.

IN THE

Supreme Court of the United States.

NUMBER 20198.

ELIZABETH M. CHAMBERS,

Plaintiff in Error,

vs.

THE BALTIMORE & OHIO RAILROAD COMPANY,

Defendant in Error.

BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

CHARLES KOONCE, JR.,
Attorney for Plaintiff in Error.

R. B. MURRAY,
W. S. ANDERSON,
Of Counsel.

IN THE

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BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

STATEMENT.

This cause comes into this Court on error and it is sought thereby to reverse the judgment of the Supreme Court of the State of Ohio, whereby the judgments of the Circuit and Common Pleas Courts of Mahoning County in said state were reversed, and the petition of the plaintiff dismissed, and in and by said judgment of reversal of said Supreme Court of Ohio judgment was rendered in favor of the defendant in error

herein, The Baltimore & Ohio Railroad Company, and against the plaintiff in error, Elizabeth M. Chambers.

The precise question to be determined in this case is whether the State of Ohio can, consistent with the provisions of Sec. 2, Art. 4, of the Constitution of the United States, prohibit the wife of a citizen of Pennsylvania from maintaining in the Courts of Ohio an action to recover for the wrongful death of her husband occurring in Pennsylvania, the right to maintain such action being accorded to the widow of a citizen of Ohio when so killed in the State of Pennsylvania.

The husband of the plaintiff in error, Harry E. Chambers, who, with his wife were citizens of the State of Pennsylvania, was killed by the wrongful act of The Baltimore & Ohio Railroad Company on the 19th day of September, 1902. The cause of action herein sought to be enforced for said wrongful death was created by the provisions of the Act of the General Assembly of the State of Pennsylvania, approved April 15, 1851, and the Act of the General Assembly of said state, approved April 26, 1855. The portion of said provision pertinent to the question involved in this case is as follows:

> "Sec. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

Plaintiff, as the widow of said decedent, commenced her action to enforce said cause of action, so created by said statute, in the Court of Common Pleas of Mahoning County, Ohio, a Court of general jurisdiction.

Upon trial thereof in said Court a verdict was returned by the jury in favor of the plaintiff in the amount of Three Thousand Dollars, upon which judgment was rendered by the trial court. (R., p. 11.)

The right to maintain said action in the courts of Ohio was contested by the defendant below on the ground that the statutes of Ohio denied her said privilege, she and her decedent having been, at the time of said wrongful death, citizens of the State of Pennsylvania. This contention was based upon the following provisions of the statutes of Ohio:

> "Sec. 6134. Whenever the death of a person shall be caused by wrongful act, neglect, or default, and the act, neglect or default is such as would (if death had not ensued) have entitled the party injured to maintain an action and recover damages in respect thereof, then and in every such case the corporation which, or the person who would have been liable if death had not ensued, or the administrator or executor of the estate of such person, as such administrator or executor, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to murder in the first or second degree, or manslaughter; and when the action is against such administrator or executor the damages recovered shall be a valid claim against the estate of such deceased person."
>
> 90 O. L., 140.

> "Sec. 6134-a. Whenever the death of a citizen of this state has been or may be caused by a wrongful act, neglect or default in another state, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other state, territory or foreign country, such right of action may be enforced in this state within the time prescribed for the commencement of such action by the statute of such other state, territory or foreign country."

The contention of the defendant below in this respect was held untenable by both the Court of Common Pleas and the Circuit Court. The contention was sustained by the Supreme Court and, under such conclusion, rendered the judgment for the defendant below, hereinbefore referred to.

The syllabus of the case is as follows:

> "No action can be maintained in the courts of this state upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the State of Ohio."
>
> (R., p. 28; 73 O. S., 1).

It was insisted by said plaintiff that the construction of the Ohio Statute contended for by said defendant would result in the invalidity of said statute as being in contravention of Article 4, Section 2, of the Constitution of the United States, which provides that:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."
>
> (R., pp. 24-26-34.)

In passing upon this contention the Court, speaking through Crew, J., sought to evade its effect by its holding as follows:

> 1. That the constitutional provision, herein relied upon, applied to fundamental and universal rights, not to special privileges.
>
> 2. That under the statute, the constitutionality of which is herein challenged, non-resident next of kin have equal rights, and the courts of Ohio are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of the action, was at the time of his death a citizen of Ohio.

3. That it is against the public policy of the state to entertain said actions for the reason that to open the courts of the state in cases of this kind for the adjustment and settlement of the rights of the parties, is to add to the already over-burdened condition of the dockets of the courts of said state, and thereby make the settlement of rights originating outside the state, between citizens of other states, a charge and burden upon the people of the State of Ohio.

While the construction so given to the statute by the Court of last resort of the State of Ohio came as a surprise to the bar of the state, yet by said construction we are bound and the plaintiff in this case must be held to have lost her right to maintain her action in the courts of the State of Ohio, unless the statute itself, making this limitation of her right, is invalid, as being in contravention of the portion of the Federal Constitution hereinbefore referred to.

We are brought, therefore, to the consideration of the grounds, as hereinbefore enumerated, upon which the Supreme Court of Ohio attempted to justify the statute, as construed by it. Their consideration will be taken up in the order as hereinbefore set forth.

SPECIFICATION OF ERRORS.

The following errors are relied upon by the plaintiff in error in this Court:

FIRST. That said judgment of said Supreme Court of Ohio reversing the judgment rendered in her favor by the Court of Common Pleas and Circuit Court of Mahoning County, Ohio, and dismissing her petition, violates in effect, and is repugnant to Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

SECOND. That said Supreme Court of Ohio erred in finding and adjudging that Section 6134 (90 Ohio Laws 140) and Section 6134a as amended on the 6th day of May, 1902, (95 Ohio Laws 401) under the construction given thereto by said Supreme Court of Ohio, (said construction being that no action can be maintained in the courts of the said State of Ohio upon a cause of action for wrongful death occurring in another state, except where the person wrongfully killed was a citizen of the State of Ohio), were not in contravention of, and repugnant to said Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided, that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states.

THIRD. That by the record in this case it appears that the judgment aforesaid given by said Supreme Court of Ohio, reversing the judgment rendered by the Circuit Court and Court of Common Pleas, of the County of Mahoning and State of Ohio, was given for the said Baltimore & Ohio Railroad Company against the said Elizabeth M. Chambers, whereas, by the law of the land, and particularly by the rights and privileges guaranteed to said Elizabeth M. Chambers by that part of Section 2 of Article 4 of the Constitution of the United States, wherein and whereby it is provided that the citizens of each state shall be entitled to all priv-

ileges and immunities of the citizens in the several states, the said judgment ought to have been given for the said Elizabeth M. Chambers against said The Baltimore & Ohio Railroad Company; and that the said Elizabeth M. Chambers, a citizen of the State of Pennsylvania, should have been held to have had the right and privilege to institute and maintain her said cause of action in the courts of the State of Ohio, the citizens of said State of Ohio, being entitled to said privilege.

BRIEF OF ARGUMENT.

I.

The right to maintain a transitory action by a citizen of one of the states of the United States, in the courts of a sister state is one of the privileges and immunities comprehended by Section 2 of Article 4 of the Constitution of the United States.

II.

The statute is not saved by the holding of the Supreme Court of Ohio that non-resident next of kin have equal rights, and the courts of Ohio are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of action, was at the time of his death a citizen of Ohio.

(1) The real purpose and effect of the Act, as construed, was and is to discriminate in favor of citizens of Ohio and against citizens of other states. Theoretical exceptions cannot save it from the ban of the constitutional provision herein in question.

(2) The statute, as construed, is a denial of the right of the citizens of a sister state to have the cause of action resulting from the wrongful act enforced in favor of his wife and children.

(3) The State of Ohio cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people.

III.

In order that the statement that it is against the public policy of the State of Ohio to enforce in its courts a cause of action in favor of a citizen of another state can avail, it must first appear that it would be against the public policy of said state to enforce a like cause of action in favor of a citizen of its own state, or a like cause of action arising in its own state.

ARGUMENT.

I.

IS THE RIGHT TO MAINTAIN A TRANSITORY ACTION BY A CITIZEN OF ONE OF THE STATES OF THE UNITED STATES, IN THE COURTS OF A SISTER STATE ONE OF THE PRIVILEGES AND IMMUNITIES COMPREHENDED BY SECTION 2 OF ARTICLE 4 OF THE CONSTITUTION OF THE UNITED STATES?

It was stated by the Supreme Court of Ohio in considering this question, as follows:

> "But it is contended in argument by counsel for defendant in error, that such construction and interpretation of this statute renders it unconstitutional, by putting it in conflict with Section 2, Article 4, of the Federal Constitution, which provided that: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' *But the contary is now too well established to be disputed. This constitutional provision applied to fundamental and universal rights, not to special privileges.*"

In the light of this statement it becomes necessary to review the utterances of this Court on this subject which are uniform in their holdings to the direct contrary of that which has been held by the Supreme Court of Ohio in the quotation just given.

One of the first cases in which the question as to the meaning of "privileges and immunities," in the article and section of the Constitution herein relied upon, was considered, is that of *Corfield v. Coryell*, decided by Mr. Justice Washington at

the Circuit. In his consideration of this question the following language was used by him:

> "The inquiry is, what are the privileges and immunities of citizens in the several states? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several states which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are, it would perhaps be more tedious than difficult to enumerate. They may, however, be comprehended under the following heads: protection by the government; the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety; subject, however, to such restraint as the government may justly prescribe for the general good of the whole; the right of the citizens of one state to pass through, or to reside in any other state for the purposes of trade, agriculture, professional pursuits or otherwise; to proclaim the benefit of the Writ of *Habeas Corpus; to institute and maintain actions of any kind in the courts of the state;* to take, hold and dispose of property, either real or personal; and an exemption from higher taxes or impositions than are paid by the other citizens of the states; may be mentioned as some of the particular privileges and immunities of citizens, which are clearly embraced by the general description of privileges deemed to be fundamental. * * * These, among others which might be mentioned, are, strictly speaking, privileges and immunities, and the enjoyment of them by the citizens of each state in every other state was manifestly calculated (to use the expression of the preamble of the corresponding provision in the old Articles of Confederation) 'the better to secure and perpetuate mutual friendship and intercourse among people of the different states of the Union.'"
>
> Corfield v. Coryell, 4 Wash. C. C., 371-380.

In the case of *Ward v. Maryland*, this Court, speaking through Mr. Justice Clifford, says:

> "Attempt will not be made to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the Court. Beyond doubt those words are words of very comprehensive meaning, but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one state to pass into any other state of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate; *to maintain actions in the courts of the state;* and to be exempt from any higher taxes or excises that are imposed by the state upon its own citizens."

Ward v. Maryland, 12 Wall., 418-430.

In the case of *Cole v. Cunningham*, this Court, speaking through Mr. Chief Justice Fuller, held:

> "The intention of Section 2, of Article 4 was to confer on the citizens of the several states a general citizenship, and to communicate all the privileges and immunities which the citizens of the same state would be entitled to under the like circumstances, *and this includes the right to institute actions.*"

Cole v. Cunningham, 133 U. S., 107-114.

Referring to the foregoing cases this Court, in the case of *Blake v. McClung*, speaking through Mr. Justice Harlan, said:

> "These principles have not been modified by any subsequent decision of this Court."

In the same case this Court used the following language, page 256:

> "We must not be understood as saying that a citizen of one state is entitled to enjoy in another state *every*

privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a state to its own people in which the citizens of other states may not participate except in conformity to such reasonable regulations as may be established by the state. *For instance, a state cannot forbid citizens of other states from suing in its courts. That right being enjoyed by its own people;* but it may require a non-resident although a citizen of another state, to give bond for costs, although such bond be not required of a resident."

Blake v. McClung, 172 U. S., 239-256.

In holding that a statute of Kentucky was in contravention of the portion of the Federal Constitution herein relief upon, Evans, District Judge, used the following language:

"Sub-section One, Section 2, Article 4, Const. U. S., is in this language: 'The citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states.'

"The purpose of this most essential provision, and the vital principle upon which it is based, must be obvious. It was matter of the gravest moment, if the people of the United States were to have 'a more perfect Union,' or if 'domestic tranquility' was to be 'insured' to them, as suggested in the preamble, that such a provision should be inserted in the organic law; otherwise each state would take care mainly of its own citizens, and by a system of discriminations, which would naturally grow more strict and hostile, as time progressed, we should only have had dis-union and contention istead or 'Union' and 'tranquility.' Hence the profound necessity for the provision that the citizens of each state 'shall be entitled' to all the 'immunities' of the citizens of the several states. This clause was not meant to announce an abstract proposition, but the constitution, with all the force and vigor possible, declares that the citizens of Pennsylvania shall be 'entitled' in Kentucky to all the immunities and privileges of the citizens of Kentucky. Moreover, this great pro-

vision is mandatory, and must not and cannot be ignored by the courts."

Moredock v. Kirby, 118 Fed. Rep., 180-181-182.

"It has been justly said that no provision in the constitution has tended so strongly to constitute the citizens of the United States one people as this. * * * Indeed, without some provision of the kind, removing from the citizens of each state the disabilities of alienage in the other states, and giving them equality of privilege with citizens of those states, the republic would have constituted little more than a league of states; it would not have constituted the Union which now exists."

Paul v. Virginia, 8 Wall., 168-180.

Recognizing the controlling effect of this constitutional guarantee it has been held in the following cases that neither legislature nor Court can deprive a citizen of one state from maintaining in the courts of a sister state a cause of action sounding in tort whether it be for personal injury or wrongful death.

"Under Sec. 2, Art. IV, Const. of U. S., a citizen of one state has the same right to bring and maintain an action in the courts of another state, upon a cause of action arising in the former state against a citizen thereof, as has a citizen of the state in which the action is brought; and the Court has no discretionary power to dismiss the action merely because the parties are both residents, and the cause of action arose in, another state. * * *

"A transitory cause of action, arising and becoming vested in one state under principles of the common law recognized in that state and another alike, may be enforced in the latter state, if jurisdiction of the person of the defendant be obtained. *Anderson v. M. & St. P. R. Co.*, 37 Wis., 321, distinguished."

Eingartner v. The Illinois Steel Co., 94 Wis., 70.

In the course of its opinion in the case just referred to the Court says:

> "In the present case it is practically claimed by defendant that this rule applies to such an action as the present; in other words, that citizens of another state of this Union are to be treated in the courts of this state precisely as if they were aliens and that a cause of action arising in another state is to be treated as though it arose in a foreign country; and this really is the first question to be settled.
>
> "It is provided by the Constitution of the United States (Sec. 2, Art. IV) that 'the citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' * * * We are entirely satisfied that one of the 'privileges and immunities' referred to in the constitutional provision is the right to bring and maintain an action in the courts of the state. Any citizen of this state may bring an action in the Circuit Court of this state upon a transitory cause of action arising in another state, and against a citizen of another state, provided he can obtain jurisdiction of the person of the defendant in this state. This is one of the rights guaranteed him under our constitution and laws. If the words 'privileges and immunities' in the constitutional clause in question refer to the right to maintain actions, then a resident of another state has the same right to bring an action in the courts of this state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of this state has, because the constitution guarantees him the same right as a citizen of this state."
>
> "It is among the fundamental rights of a people under our government that they may be secured in the acquirement, possession, and enjoyment of property, and for this purpose courts are instituted as part of the organic law, in which every person shall have his remedy by due process of law. It is secured as a privilege to which every citizen of the United States is entitled. The redress of wrongs and the means of enforcing contracts are of the greatest consequence to citizens of every state.
>
> "Article 4, Sec. 2, of the Constitution of the United

States declares that—'The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states.' * * *

"The right to bring suit in the several courts of this state having jurisdiction is a privilege of every citizen of this state. Especially is this true with reference to the enforcement of contracts. A citizen of another state may come into this, and acquire and enjoy property. He may inherit and transmit property. He may enter into contracts, to the same extent that a citizen of this state can do so, and in this his rights are guaranteed by the above provision of the constitution; and I think that his right to bring suit in this state, in any case where a citizen of the state may, is also guaranteed and protected by this provision of the constitution."

Cofrode v. Gartner, Circuit Judge, 79 Mich., 332-342-343.

"Section 784, 2 G. & H. 330, was intended to provide a remedy, not only for the resident citizens of this state, but for the citizens of the several states while passing through or residing within this state. Section 2, Article 4, of the Constitution of the United States, would secure the benefit of this section to citizens of other states, if refused by our law."

Railroad Co. v. Hendricks, Admr., 41 Ind., 48.

"The courts of this state have jurisdiction in actions to recover damages under the statute of the State of Pennsylvania for negligently causing the death of a person in that state, although such person and his next of kin were all citizens of such state at the time of the injury."

Schell v. Youngstown Sheet & Tube Co., 26 O. C. C. Reps., 209.

To the same effect are the following cases:

State v. Cadigan, 73 Vt., 245.

Hoadley v. Insurance Commissioners, 37 Fla., 564, s. c. 33 L. R. A., 388.

Roby v. Smith, 131 Ind., 342.

Shirk v. Lafayette, 52 Fed. Rep., 857.

Farmers, etc., Co. v. Railroad Co., 27 Fed. Rep., 146.

State v. Duckworth, 5 Idaho, 642, s. c. 39 L. R. A., 365.

A reference to the opinion delivered by the Supreme Court of Ohio in this case discloses that it is based upon the assumption that the right of a citizen of one state to maintain an action in a sister state is dependent wholly upon the doctrine of comity. While the doctrine of comity with reference to the maintenance of an action applies as between the citizens of different nations, and between the citizens of foreign nations and the several states of the United States, it is not the foundation upon which the citizens of the several states rest their right in invoking the courts of sister states. The foundation of that right is the provision of the Federal Constitution herein relied upon, to-wit:

> "The citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."

That being true, it does not lie within the power of either legislature or Court to annul a constitutional right on the pretended theory that the right exists only in comity and is subject to the rules and principles governing comity rather than those which control constitutional guarantees.

It is submitted that, both on principle and authority, the right of a citizen of one state to maintain an action, transitory in its character—in the courts of a sister state, provided the defendant can be found in said jurisdiction, either by service

or entry of apearance—is guaranteed to such citizen by the provision of the Federal Constitution herein invoked and that the holding of the Supreme Court of Ohio that such right was not comprehended by said provision of the constitution, was clearly erroneous and deprived her of the rights guaranteed to her thereby.

II.

THE STATUTE IS NOT SAVED BY THE HOLDING OF THE SUPREME COURT OF OHIO THAT NON-RESIDENT NEXT OF KIN HAVE EQUAL RIGHTS AND THE COURTS OF OHIO ARE EQUALLY OPEN TO THEM, AS TO RESIDENT NEXT OF KIN, PROVIDED ONLY THAT THE PERSON WHOSE WRONGFUL DEATH IS THE SUBJECT OF THE ACTION, WAS AT THE TIME OF HIS DEATH A CITIZEN OF OHIO.

It was stated by the Supreme Court of Ohio in considering this proposition, as follows:

> "Furthermore, under this statute non-resident next of kin have equal rights, and our courts are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of the action, was at the time of his death a citizen of Ohio."

1. THE REAL PURPOSE AND EFFECT OF THE ACT AS CONSTRUED, WAS, AND IS, TO DISCRIMINATE IN FAVOR OF CITIZENS OF OHIO AND AGAINST CITIZENS OF OTHER STATES. THEORETICAL EXCEPTIONS CANNOT SAVE IT FROM THE BAN OF THE CONSTITUTIONAL PROVISION HEREIN IN QUESTION.

It is submitted that the position thus taken by the Court is too narrow. It proceeds on the assumption that the wife

and children are citizens and residents of a different state from that of their decedent. A condition which is so rarely the case that the exception should not be permitted to be the controlling factor and to deprive the vast majority affected thereby of the right to challenge the constitutionality of the statute which thus deprives them of their right to maintain their action in the courts of another state as guaranteed to them by the provision of the constitution herein relied upon. The real purpose of the act, if it be given the construction given to it by the Supreme Court of Ohio, was to deprive citizens of other states from coming into the state with their causes of action arising under the death statute of other states, but saving to the citizens of Ohio, and those claiming under them, said right. This Court has many times held that it will look through form to the substance for the purpose of determining constitutional rights. That principle is peculiarly applicable in this case, where, whatever the *theory* may be as to avoiding the charge of unconstitutionality, the *operative effect* is that in almost every case which ever occurs, the condition is such as to residence and citizenship of the decedent and his wife as to preclude the theory of separate residence and citizenship herein advanced as a defense of said statute. The statute is aimed at the wives and children of husbands and fathers who are citizens of other states.

To sanction such a perverted construction would be to hold that the citizens of each state may be shorn of their fundamental rights in the several states by legislative or judicial inhibition, provided the jugglery of phraseology adopted be sufficiently clever to obscure the substance of the vice underlying

such inhibition by plausible form. When rights are involved which were considered so important that the drafters of the federal constitution stripped all sources of power, both federal and state, of right to impair, they should not be lightly brushed aside by having regard to form rather than substance.

The construction of the statute herein involved, as given by the Supreme Court of Ohio, loses sight of the very *raison d'etre* of the statutory enactments known as "wrongful death statutes." The reason and spirit of their enactment was for the protection of those who, dependent upon the one, of whose maintenance they were deprived by wrongful act, were thus deprived of pecuniary support. To base the excuse for the construction of the statute herein challenged on the ground that the decedent and his dependents may be citizens of different states is, indeed, subverting substance to form.

> "The Court will look to the substance of the legislation irrespective of its form or pretense."
>
> Smyth v. Ames, 169 U. S., 466.

That the plaintiff in error has been deprived of her right to so maintain her action because there may exist some isolated case where the wife of a citizen of Ohio may be a citizen of some other state is admitted by the party contending for, and by the Court giving, such construction. This Court, when weighing a statute in the constitutional balance is not blinded by technicalities and theoretical exceptions.

> "The purpose of a statute, in whatever language it may be framed, must be determined by its natural and reasonable effect."
>
> Henderson v. Mayor of New York, 92 U. S., 259-268.
>
> Reid v. Colorado, 187 U. S., 137-157.

> "Nor can the rule be changed, and such a result be accomplished, constitutionally, under cover of the very rare exceptions just mentioned of citizens of Kentucky residing out of the state, but continuing to do business here. *The constitutional provision deals with the rights of citizens generally, and its operation cannot be controlled by isolated instances.*"
>
> Moredock v. Kirby, 118 Fed. Rep., 180-182.

To permit such construction of the statute for the purpose of evading the constitutional test is to deprive in many instances the party having the cause of action of her means of recovery; for, if the wrongful act be committed in another state, the wrongdoer need but go into the State of Ohio to secure exemption from liability. As stated by the Circuit Court of Mahoning County:

> "In addition to its evident unconstitutionality such a construction would be shocking to courts in the administration of justice. A person might cause the death of another by the utmost recklessness in the State of Pennsylvania and have a large amount of property in Ohio; yet if the party killed was not a citizen of Ohio the party guilty of the negligence could make this state his asylum freed from all liability for his act for the reason that our courts are closed against the injured parties."

The effect of this fact is sought to be avoided by the Court below thus:

> "It is also suggested by counsel for defendant in error, that if the courts of this state will not permit the enforcement therein, of actions for wrongful death occurring in other states, without reference to the citizenship of the person killed, that in many cases the right to recover will be lost. *This does not follow, for in all cases of diverse citizenship the Federal Courts are given jurisdiction and the wrongdoer may be followed to any state in which he may go, and the right given by the state where the death occurred, may there be enforced against him in the courts of the United States.*"
>
> (R., pp. 34-35).

That this statement is erroneous requires no argument to this Court. Federal courts do not entertain actions which have been determined to be against the public policy of the state in which such Federal courts sit. It has been so held by the Federal courts, sitting in Ohio, since the decision of the case at bar by the Supreme Court.

But, again, if the State of Ohio may disqualify a wife or children of a citizen of another state from maintaining in its courts an action for wrongful death arising under the statute of another state, it can, for the same reason, deny them the right to maintain an action in its courts for the recovery of real or personal property the title to which they acquired from their husband or father, a citizen of another state, by virtue of the provisions of the statute of descent or distribution of the latter state. If Ohio may disqualify a wife or children of a citizen of another state from maintaining in its courts an action for wrongful death, as aforesaid, it can, for the same reason, enact a statute providing that no suit shall be maintained in the courts of the State of Ohio by an assignee and owner of a promissory note made in another state the original payee of which was a citizen of another state; for, such assignee and owner may be a citizen of Ohio, and, under the same process of reasoning, be affected, as to his rights to maintain his action thereon in the State of Ohio, equally with a citizen of another state who may be the assignee and owner thereof.

If it can thus deprive citizens of other states from enforcing transitory causes of action, having their origin in another state under either the common law or the statute of such latter state, then why not, for the same reason, deprive a citizen of

another state of the right to maintain his action in the state courts for any cause of action which he may have; why not foreclose the courts of the state from entertaining *any* action wherein the plaintiff is a citizen of another state. It requires but the statement of the proposition to disclose its untenability and its vice.

2. THE STATUTE, AS CONSTRUED, IS A DENIAL OF THE RIGHT OF THE CITIZEN OF A SISTER STATE TO HAVE THE CAUSE OF ACTION RESULTING FROM THE WRONGFUL ACT ENFORCED IN FAVOR OF HIS WIFE AND CHILDREN.

But the statute, as construed, is also a denial of a right to the citizen of a sister state, wrongfully killed, to have the cause of action resulting therefrom enforced in favor of his wife and children. It is a discrimination in favor of the citizen of Ohio, losing his life by wrongful act in another state, and against the citizen of a sister state losing his life under the same circumstances. The proposition is clearly stated by the Circuit Court of Ohio in considering this question in the case of *Schell v. Iron Sheet & Tube Company, supra,* upon the authority of which case the case at bar was determined in favor of the plaintiff in the Court of Common Pleas and Circuit Court. The language used by the judge delivering the opinion of the Court is as follows:

> "The construction contended for by defendant in error does not meet the question directly, but it is indeed more comprehensive and objectionable. If the death of a citizen of Pennsylvania is negligently caused, as in this case, in that state, his beneficiaries have no standing whatever in our courts, but if a citizen of Ohio is killed by the negligent act of another in that state, his beneficiaries may have complete redress in our courts without regard to their citizenship, whether they be citizens

> of a foreign state or of a foreign land. Certainly the general assembly did not so intend and we think such a construction is not required."

3. THE STATE OF OHIO CANNOT FORBID CITIZENS OF OTHER STATES FROM SUING IN ITS COURTS, THAT RIGHT BEING ENJOYED BY ITS OWN PEOPLE.

But the foregoing contentions on this proposition have been addressed thereto in answer to the ground upon which the Court of last resort of the State of Ohio attempted to justify the statute. As has already been said the position so taken by the Court, and by counsel for defendant, is too narrow to save it from the charge of unconstitutionality. The broad position is here taken as stated by this Court in the case of *Blake v. McClung, supra,* page 256, that a state cannot forbid citizens of other states from suing in its courts, that right being enjoyed by its own people. That the right of suing in its courts, generally, and of suing to enforce causes of action for wrongful death in particular, is accorded by the State of Ohio to its citizens, must be admitted. The citizens of Ohio thus having the right to maintain actions on transitory causes of action generally in the courts of the State of Ohio the same right must be accorded to citizens of other states. Quoting again from the language used by the Court in the case of *Eingartner v. Steel Company, supra.*

> "Any citizen of this state may bring an action in the Circuit Court of this state upon a transitory cause of action arising in another state, and against a citizen of any state, provided he can obtain jurisdiction of the person of the defendant in this state. This is one of the rights guaranteed him under our constitution and laws. *If the words 'privileges and immunities' in the constitutional clause in question refer to the right to maintain*

actions, then a resident of another state has the same right to bring an action in the courts of this state upon a cause of action arising in another state, and against a citizen of another state, that a citizen of this state has, because the constitution guarantees him the same right as a citizen of this state."

Eingartner v. Steel Company, 94 Wis., 70-78.
Blake v. McClung, 172 U. S., 239-256.

III.

IN ORDER THAT THE STATEMENT THAT IT IS AGAINST THE PUBLIC POLICY OF THE STATE OF OHIO TO ENFORCE IN ITS COURTS A CAUSE OF ACTION IN FAVOR OF A CITIZEN OF ANOTHER STATE CAN AVAIL, IT MUST FIRST APPEAR THAT IT WOULD BE AGAINST THE PUBLIC POLICY OF A STATE TO ENFORCE A LIKE CAUSE OF ACTION IN FAVOR OF A CITIZEN OF ITS OWN STATE, OR A LIKE CAUSE OF ACTION ARISING IN ITS OWN STATE.

In holding that the statute herein in question was declarative of the public policy of the state the Supreme Court of Ohio, in its opinion, says as follows:

"To open our courts and under these circumstances, for the adjustment and settlement of the rights of the parties, is to extend an invitation to all such persons, who may, for whatsoever reason, prefer to resort to our tribunals, to seek courts of this state to enforce their claims. Thus we should greatly add to the already overburdened condition of the dockets in all our courts, and thereby make the settlement of rights originating outside the state, between citizens of other states, a charge and burden upon the people of our own state. The legislature of Ohio has, we think, by the foregoing

> legislation, manifestly declared that such is not the policy of this state."

As has already been said the Supreme Court of Ohio, in its consideration of this question, misconceived the ground upon which a non-citizen's right to maintain a transitory action in courts of the State of Ohio is based. As appears from the opinion rendered by that Court in this case, the right to maintain such action by such non-resident citizen is accorded to such citizen on the theory of comity instead of the absolute right guaranteed by the portion of the Federal Constitution herein in question. The only qualification which can be attached to the right of such non-resident to maintain his action in the courts of a sister state is that the character of the cause of action must not be against the public policy of the state the jurisdiction of which is thus invoked. The public policy thus referred to must not be a pretended public policy but must be actual and bona fide, and, to justify a Court in refusing to enforce a right of action accruing under the laws of another state because against the policy of the laws of the forum, it must appear that it is against good morals or natural justice. This Court has said on this subject:

> "In order to maintain an action for an injury to the person or to movable property, some courts have held that the wrong must be one which would be actionable by the law of the place where the redress is sought, as well as by the law of the place where the wrong was done. * * * But such is not the law of this Court. By our law, a private action may be maintained in one state, if not contrary to its own policy, for such a wrong done in another and actionable there, although a like wrong would not be actionable in the state where the suit is brought. *Smith v. Condry*, 1 How., 28; *The China*, 7 Wall., 53 64; *The Scotland*, 105 U. S., 24-29;

Dennick v. Railroad Co., 103 U. S., 111; *Texas & Pacific Railway Company v. Cox*, 145 U. S., 593."

Huntington v. Attrill, 146 U. S., 657-670.

"A negligent act causing death is in itself a tort, and, were it not for the rule founded on the maxim *actio personalis moritur cum persona*, damages therefor could have been recovered in an action at common law. The case differs in this important feature from those in which a penalty is imposed for an act in itself not wrongful, in which a purely statutory delict is created. The purpose of the several statutes passed in the states, in more or less conformity to what is known as Lord Campbell's Act, is to provide the means for recovering the damages caused by that which is essential and in its nature a tort. Such statutes are not penal, but remedial, for the benefit of the persons injured at the death. An action to recover damages for a tort is not local but transitory, and can, as a general rule be maintained wherever the wrongdoer can be found. *Dennick v. Railroad Company*, 103 U. S., 11. It may well be that where a purely statutory right is created the especial remedy provided by the statute for the enforcement of that right must be pursued, but *where the statute simply takes away a common law obstacle to a recovery for an admitted tort, it would seem not unreasonable to hold that an action for that tort can be maintained in any state in which the common law obstacle has been removed.*"

Stewart v. B. & O. R. R. Co., 168 U. S., 445.

"We have it well settled that, without regard to the rule which may obtain as to a cause of action which accrued under the laws of a separate and distinct nation a right of action which has accrued under the statute of a sister state of the Union will be enforced by Courts of another state of the Union unless against good morals, natural justice, or the general interest of the citizens of the state in which the action is brought."

Railroad Co. v. Rouse, 178 Ill., 132.

To the same effect are,

Railroad Company v. Babcock, 154 U. S., 190.
Law v. Railroad Company, 91 Fed. Rep., 817.
Davidow v. Railroad Company, 85 Fed. Rep., 193.
Van Dorn v. Railroad Company, 35 C. C. A., 282.
Wilson v. Tootle, 55 Fed. Rep., 211.
Walsh v. Railroad Company, 160 Mass., 571.
Burns v. Railroad Company, 113 Ind., 169.
Leonard v. Navigation Company., 84 N. Y., 48.
Railroad Company v. Lewis, 89 Tenn., 235.
McLeod v. Railroad Company, 58 Vt., 726.
Boyce v. Railroad Company, 63 Iowa, 70.
Bruce v. Railroad Company, 83 Ky., 174.
Railroad Company v. Lewis, 24 Neb., 848.
Knight v. Railroad Company, 108 Pa. St., 250.
O'Reilly v. Railroad Company, 16 R. I., 388.
Nelson v. Railroad Company, 88 Val., 971.

The right to maintain an action for wrongful death occurring in the State of Ohio or, occurring outside of the state of Ohio where the one wrongfully killed was a citizen of Ohio, is not only not against the public policy of said State of Ohio, but in accordance with it, as shown by Section 6134 of the Revised Statutes of Ohio. For it is by Section 6134, and not by Section 6134-a, that the policy of the State of Ohio with reference to the general right to maintain an action for wrongful death is announced.

Prior to the enactment of the original Section 6134-a the right existed in favor of citizens of other states to enforce in the Courts of the Ohio jurisdiction their causes of action for

wrongful death occurring in another state where a right was given to them by the statute of said state, *provided* said right was sought to be enforced under the terms of the statute of such other state. This statement is made with the knowledge of the holdings of the Supreme Court of Ohio in the case of *Woodward v. Railroad Company*, 10 Ohio State, 121, and *Hover v. Pennsylvania Company*, 25 Ohio State, 667, and what is said with reference to said cases by the Court in its opinion rendered in the case at bar (R., p. 32).

It is submitted that an examination of the case of *Woodward v. Railroad Company*, and of *Hover v. Pennsylvania Company, supra*, contain nothing antagonistic to the right of a party to maintain in the Ohio Courts their action on a wrongful death claim, arising under a statute of another state, *provided* the right of the party was sought to be worked out under the statute of the state where the wrongful death occurred.

The case of *Woodward v. Railroad Company* was one wherein an administrator appointed under the laws of the State of Ohio, was seeking to recover damages under an Illinois statute for wrongful death occurring in the latter state. It was held by the Court that such action *based on the Illinois statute* could not be maintained by an administrator appointed under the Ohio statute.

In the case of *Hover v. Pennsylvania Company*, the holding of the Court is confined to the proposition that an action for wrongful death occurring in another state *cannot be based on Section 6134 of the Revised Statutes of the State of Ohio.* It does not hold that when based on a statute of the state where the death occurred it cannot be maintained in the State of Ohio.

And the history of the Ohio jurisdiction discloses that actions have been maintained in its Courts on causes of action arising in other states, based on wrongful death statutes of such other states, ever since actions of that kind have been tried in the Courts of Ohio. The question here, therefore, is, can a state which by express legislative enactment declares its policy to be in favor of the enforcement of a cause of action for wrongful death occurring in its own state or in another state provided the person so killed was a citizen of such latter state, preclude citizens of another state from maintaining their cause of action for wrongful death created by a statute of a sister state, on the ground that the enforcement of such cause of action being so brought into the former state is against the public policy of the state. Under the rules heretofore referred to governing this question it is clear that it cannot thus be done. It is not a question of comity. The constitutional guaranty herein relied upon here interposes its provisions and declares to the State of Ohio, thus attempting to preclude such right, that, having granted and established the right to maintain such cause of action in favor of its own citizens, it must accord the same right to citizens of the several states.

Neither the legislatures nor a state Court can declare, that it is against the public policy of that jurisdiction to enforce actions in favor of those who are not citizens of that state; but that the same kind of actions, arising under the same kind of statutes, are enforcible and maintainable when brought by citizens of that state. In order that the plea that it is against the public policy of a state to enforce in its Courts a cause of action of a citizen of another state can avail, it must first appear that

it would be against the public policy of the state to enforce a like cause of action in favor of a citizen of its own state, on a like cause of action arising in its own state.

But the Supreme Court of Ohio did not base its conclusion upon the fact that the maintenance of an action for wrongful death was against the policy of the state, in the sense that an action on a gambling contract would be against the morals of the state and, therefore, against its public policy, but expressly declares, as hereinbefore quoted, that the maintenance of such action is against the public policy of the state for the sole reason that it will tend to burden the dockets of the Courts of this state.

The fact that litigation may congest the Court dockets is not the kind of reason which will permit it to escape the charge of unconstitutionality on the ground of public policy.

> "No Court or judge has a lawful right to deny to suitors the privilege of bringing and prosecuting their suits, upon the ground that entertaining them will entail expense upon the county."
>
> Cofrode v. Gartner, 79 Mich., 332.

It must be apparent upon the most casual reflection that any other rule would be in direct conflict with the portion of the Federal Constitution herein in question, no matter how limited an application might be given thereto for, as soon as the proposition that a state could preclude a non-citizen from maintaining a suit of a given character in the Courts within its limits has been sustained the door, once having been opened, would permit of an inhibition on the part of such state of the maintaining of *any* suit, or *any* character, by a non-citizen of said

state. If the State of Ohio could preclude citizens of Pennsylvania from maintaining an action in tort in the Courts of the State of Ohio why could not the State of Pennsylvania retaliate by preventing the citizens of the State of Ohio from maintaining actions on contract in its Courts? It was to prevent this very thing, among others, for which Section 2 of Article IV was placed in the Federal Constitution. The reason thus given by the Supreme Court of Ohio furnishes one of the strongest arguments against the conclusion arrived at by said tribunal. Such a Union of states would not be worth preserving.

CONCLUSION.

The parties were rightfully before the Courts of the State of Ohio; the initial Court had full jurisdiction of the parties and the subject-matter; and any statute, or construction given thereto, which prevents a maintenance of such action upon a transitory cause of action arising in another state for the reason that the one who was killed was not a citizen of the State of Ohio is in contravention of that portion of the Federal Constitution which guarantees that "the citizens of each state shall be entitled to all the privileges and immunities of citizens of the several states."

Respectfully submitted,

Charles Koonce Jr

CHARLES KOONCE, JR.,
Attorney for Plaintiff in Error.

R. B. MURRAY,
W. S. ANDERSON,
Of Counsel.

CHAMBERS *v.* BALTIMORE AND OHIO RAILROAD COMPANY.

ERROR TO THE SUPREME COURT OF THE STATE OF OHIO.

No. 22. Argued October 17, 18, 1907.—Decided November 18, 1907.

This court has jurisdiction to review the judgment on writ of error under § 709, Rev. Stat., if the opinion of the highest court of the State clearly shows that the Federal question was assumed to be in issue, was decided adversely, and the decision was essential to the judgment rendered.

The right to sue and defend in the courts of the States is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States, and equality of treatment in regard thereto does not depend upon comity between the States, but is granted and protected by that provision in the Constitution; subject, however, to the restrictions of that instrument that the limitations imposed by a State must operate in the same way on its own citizens and on those of other States. The State's own policy may determine the jurisdiction of its courts and the character of the controversies which shall be heard therein.

The statute of Ohio of 1902 providing that no action can be maintained in the courts of that State for wrongful death occurring in another State except where the deceased was a citizen of Ohio, the restriction operating equally upon representatives of the deceased whether they are citizens of Ohio or of other States, does not violate the privilege and immunity provision of the Federal Constitution.

73 Ohio St. 1, affirmed.

THE facts are stated in the opinion.

Mr. Charles Koonce, Jr., with whom *Mr. R. B. Murray* and *Mr. W. S. Anderson* were on the brief, for plaintiff in error:

The right to maintain a transitory action by a citizen of one of the States of the United States, in the courts of a sister State, is one of the privileges and immunities comprehended by § 2 of Art. IV of the Constitution of the United States. *Corfield* v. *Coryell*, 4 Wash. C. C. 371–380; *Ward* v. *Maryland*, 12 Wall. 418, 430; *Cole* v. *Cunningham*, 133 U. S. 107–114; *Blake* v. *McClung*, 172 U. S. 239–256; *Moredock* v. *Kirby*, 118 Fed. Rep. 180–182; *Paul* v. *Virginia*, 8 Wall. 168–180; *Cofrode* v. *Gartner*, 79 Michigan, 332–343; *Railroad Co.* v. *Hendricks*, 41 Indiana, 48; *Schell* v. *Youngstown Sheet & Tube Co.*, 26 O. C. C. Reps. 209; *State* v. *Cadigan*, 73 Vermont, 245; *Hoadley* v. *Insurance Commissioners*, 37 Florida, 564; *S. C.*, 33 L. R. A. 388; *Roby* v. *Smith*, 131 Indiana, 342; *Shirk* v. *Lafayette* 52 Fed. Rep. 857; *Farmers' &c. Co.* v. *Railroad Co.*, 27 Fed. Rep. 146; *State* v. *Duckworth*, 5 Idaho, 642; *S. C.*, 39 L. R. A. 365.

While the doctrine of comity with reference to the maintenance of an action applies as between the citizens of different nations, and between the citizens of foreign nations and the several States of the United States, it is not the foundation upon which the citizens of the several States rest their right in invoking the courts of sister States. The foundation of that right is the privilege and immunity provision of the Federal Constitution and it is not within the power of either legislature or court to annul a constitutional right on the pretended theory that the right exists only in comity and is subject to the rules and principles governing comity rather than those which control constitutional guarantees.

The statute is not saved by the holding of the Supreme Court of Ohio that non-resident next of kin have equal rights, and the courts of Ohio are equally open to them, as to resident next of kin, provided only that the person whose wrongful death is the subject of action, was at the time of his death a citizen of Ohio.

The real purpose and effect of the act, as construed, was and

is to discriminate in favor of citizens of Ohio and against citizens of other States. Theoretical exceptions cannot save it from the ban of the constitutional provision herein in question.

The statute, as construed, is a denial of the right of the citizens of a sister State to have the cause of action resulting from the wrongful act enforced in favor of his wife and children.

The State of Ohio cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people. *Eingartner* v. *Steel Company*, 94 Wisconsin, 70–78; *Blake* v. *McClung*, 172 U. S. 239–256.

In order that the statement that it is against the public policy of the State of Ohio to enforce in its courts a cause of action in favor of a citizen of another State can avail, it must first appear that it would be against the public policy of said State to enforce a like cause of action in favor of a citizen of its own State, or a like cause of action arising in its own State. The only qualification which can be attached to the right of such non-resident to maintain his action in the courts of a sister State is that the character of the cause of action must not be against the actual public policy of the State. And, to justify a court in refusing to enforce a right of action accruing under the laws of another State because against the policy of the laws of the forum, it must appear that it is against good morals or natural justice. *Huntington* v. *Attrill*, 146 U. S. 657, and cases there cited; *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445; *Railroad Co.* v. *Rouse*, 178 Illinois, 132; *Railroad Company* v. *Babcock*, 154 U. S. 190; *Law* v. *Railroad Company*, 91 Fed. Rep. 817; *Davidow* v. *Railroad Company*, 85 Fed. Rep. 193; *Van Dorn* v. *Railroad Company*, 35 C. C. A. 282; *Wilson* v. *Tootle*, 55 Fed. Rep. 211; *Walsh* v. *Railroad Company*, 160 Massachusetts, 571; *Burns* v. *Railroad Company*, 113 Indiana, 169.

Mr. George F. Arrel, with whom *Mr. James P. Wilson* and *Mr. John G. Wilson* were on the brief, for defendant in error:

This statute creates no discrimination between the citizens of Ohio and citizens of any other State. Under its provisions

it is only essential to the maintenance of the action to enforce the right in the courts of Ohio, that the decedent shall have been, at the time of his death, a citizen of Ohio. If the beneficiary under the statute of the State, giving the right, and in which the wrongful act took place, and the death resulted, happens to be a citizen of Ohio, the right secured by the statute could not be enforced in the courts of Ohio.

Unless an act of the state legislature in fact, and in some way discriminates as to the right in question between its citizens and citizens of another State, such act does not offend against this provision in the Federal Constitution. *Paul* v. *Virginia*, 8 Wall. 180; *Slaughter House Cases*, 16 Wall. 36.

True, the right to maintain the action in the courts of Ohio is made to depend in part upon the fact that the decedent at the time of his wrongful death was a citizen of Ohio, but such fact does not in any wise tend to show discrimination between or among beneficiaries, no matter where they may reside, or of what State or States they may be citizens. The act is open to no constitutional objection on the ground that it provides that an action may be maintained in the courts of Ohio for the wrongful death of one of its citizens, if the statutory law of the State in which he came to his death by wrongful act gives a right of such action. In other words, the act is free from objection in so far as it relates to the death of a citizen of Ohio. It is only objectionable, if at all, when applied to the maintenance of an action in the courts of Ohio for the wrongful death of a citizen of another State. It cannot be possible that by this provision of the Federal Constitution, the legislature of Ohio is inhibited from providing that where a citizen of another State meets his death by wrongful act in the State of which he is a citizen, that an action to recover compensation for his death cannot be maintained in the courts of Ohio.

The decision of the Supreme Court of Ohio herein clearly determines and establishes the public policy of the State of Ohio upon this subject, and this public policy, so determined and established, is clearly the result not only of legislative

enactment, but of judicial decision. This is clearly a subject upon which a State by its legislative and judicial departments may establish its own public policy. *Texas & Pacific Ry. Co.* v. *Cox*, 145 U. S. 829; *Stewart's Admr.* v. *B. & O. R. R. Co.*, 168 U. S. 445.

If, then, a foreign statute may not be enforced in a State whose policy is directly opposed to the policy of the State wherein the death occurred, under the doctrine of the *Stewart case* and other cases in this Supreme Court, no privilege or immunity has been denied to this citizen of the State of Pennsylvania.

MR. JUSTICE MOODY delivered the opinion of the court.

This is a writ of error directed to the Supreme Court of the State of Ohio. The plaintiff in error is the widow of Henry E. Chambers, who, while in the employ of the defendant in error as a locomotive engineer and engaged in the performance of his duty, received injuries from which he shortly afterwards died. Both husband and wife were at the time of the injuries and death citizens of Pennsylvania, and the wife has since continued to be such. The injuries and death occurred in Pennsylvania. The widow brought an action, in the Court of Common Pleas of the State of Ohio, against the defendant railroad, alleging that the injuries were caused by its negligence. In that action she sought to recover damages under certain parts of the Constitution and laws of Pennsylvania printed in the margin,[1] which provided for the recovery of damages

[1] Sections 18 and 19 of the act of April 15, 1851, are as follows, Pennsylvania Laws, 1851, p. 674: "SEC. 18. No action hereafter brought to recover damages for injuries to the person by negligence or default, shall abate by reason of the death of the plaintiff; but the personal representatives of the deceased may be substituted as plaintiff, and prosecute the suit to final judgment and satisfaction. SEC. 19. Whenever death shall be occasioned by unlawful violence or negligence, and no suit for damages be brought by the party injured, during his or her life, the widow of any such deceased, or if there be no widow, the personal representatives, may maintain an action for and recover damages for the death thus occasioned."

for death. The plaintiff had a verdict and judgment in the Court of Common Pleas, from which, by petition in error, the case was removed first to an intermediate court and then to the Supreme Court of the State. There it was insisted by the defendant that the action could not be maintained in the courts of Ohio. The Supreme Court sustained this contention, reversed the judgments of the court below, and entered judgment for the defendant. A statute of Ohio provided that "whenever *the death of a citizen of this State* has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." There was no other statutory provision on the subject. The Supreme Court held that the action authorized by this statute for a death occurring in another State was only when the death was that of a citizen of Ohio; that the common law of the State forbade such action; and that as the person, for whose death damages were demanded in this case, was not a citizen of Ohio, the action would not lie. The plaintiff brings the case here on writ of error, alleging that the statute thus construed and the judg-

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Sections 1 and 2 of the act of April 26, 1855, are as follows, Pennsylvania Laws, 1856, p. 309: "SEC. 1. The persons entitled to recover damages for any injury causing death, shall be the husband, widow, children or parents of the deceased, and no other relative, and the sum recovered shall go to them in the proportion they take his or her personal estate in case of intestacy, and that without liability to creditors. SEC. 2. The declaration shall state who are the parties entitled in such action; the action shall be brought within one year after the death and not thereafter." By section 21, article III, of the constitution of the State of Pennsylvania of 1874, it is provided as follows, to wit: "SEC. 21. No act of the General Assembly shall limit the amount to be recovered for injuries resulting in death, or for injuries to person or property, and in case of death from such injuries the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

ment based upon that construction violates Article IV, section 2, paragraph 1, of the Constitution of the United States, which provides that "The citizens of each State shall be entitled to all privileges and immunities of citizens in the several States." This allegation presents the only question for our consideration.

The defendant objects to our jurisdiction to reëxamine the judgment because the Federal question was not properly and seasonably raised in the courts of the State. But it clearly and unmistakably appears from the opinion of the Supreme Court that the Federal question was assumed to be in issue, was decided against the claim of Federal right, and that the decision of the question was essential to the judgment rendered. This is enough to give this court the authority to reëxamine that question on writ of error. *San José Land & Water Company* v. *San José Ranch Company*, 189 U. S. 177; *Haire* v. *Rice*, 204 U. S. 291.

In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. *Corfield* v. *Coryell*, 4 Wash. C. C. 371, 380, per Washington, J.; *Ward* v. *Maryland*, 12 Wall. 418, 430, per Clifford, J.; *Cole* v. *Cunningham*, 133 U. S. 107, 114, per Fuller, C. J.; *Blake* v. *McClung*, 172 U. S. 239, 252, per Harlan, J.

But, subject to the restrictions of the Federal Constitution, the State may determine the limits of the jurisdiction of its courts, and the character of the controversies which shall be heard in them. The state policy decides whether and to what

extent the State will entertain in its courts transitory actions, where the causes of action have arisen in other jurisdictions. Different States may have different policies and the same State may have different policies at different times. But any policy the State may choose to adopt must operate in the same way on its own citizens and those of other States. The privileges which it affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other States is void, because in conflict with the supreme law of the land.

The law of Ohio must be brought to the test of these fundamental principles. It appears from the decision under review (and we need no other authority) that by the common law of the State the courts had no jurisdiction to entertain actions to recover damages for death where the cause of action arose under the laws of other States or countries. This rule was universal in its application. The citizenship of the persons who brought action or of the person for whose death a remedy was sought was immaterial. If the death was caused outside the State and the right of action arose under laws foreign to the State, its courts were impartially closed to all persons seeking a remedy, entirely irrespective of their citizenship. The common law, however, was modified by a statute which, as amended, became the statute under consideration here. By this statute the courts were given jurisdiction over certain actions of this description, while the common law was left to control all others. A discrimination was thus introduced into the law of the State. The discrimination was based solely on the citizenship of the deceased. The courts were open in such cases to plaintiffs who were citizens of other States if the deceased was a citizen of Ohio; they were closed to plaintiffs who were citizens of Ohio if the deceased was a citizen of another State. So far as the parties to the litigation are concerned, the State by its laws made no discrimination based on citizenship, and offered precisely the same privileges to citizens of

other States which it allowed to its own. There is, therefore, at least a literal conformity with the requirements of the Constitution.

But it may be urged, on the other hand, that the conformity is only superficial; that the death action may be given by the foreign law to the person killed, at the instant when he was *vivus et mortuus*, and made to survive and pass to his representatives (*Higgins* v. *Railroad*, 155 Massachusetts, 176); that in such cases it is the right of action of the deceased which is brought into court by those who have it by survivorship; and that, as the test of jurisdiction is the citizenship of the person in whom the right of action was originally vested, and the action is entertained if that person was a citizen of Ohio and declined if he was a citizen of another State, there is in a real and substantial sense a discrimination forbidden by the Constitution.

If such a case should arise, and be denied hearing in the Ohio courts by the Ohio law, then as the denial would be based upon the citizenship of that person in whom the right of action originally vested, it might be necessary to consider whether the Ohio law did not in substance grant privileges to Ohio citizens which it withheld from citizens of other States. But no such case is before us. The Pennsylvania statute, which created the right of action sought to be enforced in the Ohio courts, has been construed by the courts of Pennsylvania. The applicable section is section 19 of the act of 1851. Of it the Pennsylvania court said in *Fink* v. *Garman*, 40 Pa. St. 95, 103:

"The 18th section was apparently intended to regulate a common law right of action, by securing to it survivorship; but the 19th section was creative of a new cause of action, wholly unknown to the common law. And the right of action was not given to the person suffering the injury, since no man could sue for his own death, but to his widow or personal representative. It was not survivorship of the cause of action which the legislature meant to provide for by this section, but

the creation of an original cause of action in favor of a surviving widow or personal representative."

This is the settled interpretation of the act. *Mann* v. *Weiand* 81½ Pa. St. 243; *Pennsylvania Railroad* v. *Bock*, 93 Pa. St. 427; *Engle's Estate*, 21 Pa. C. C. 299; *McCafferty* v. *Pennsylvania Railroad*, 193 Pa. St. 339. It appears clearly, therefore, that the cause of action which the plaintiff sought to enforce was one created for her benefit and vested originally in her. She has not been denied access to the Ohio courts because she is not a citizen of that State, but because the cause of action which she presents is not cognizable in those courts. She would have been denied hearing of the same cause for the same reason if she had been a citizen of Ohio. In excluding her cause of action from the courts the law of Ohio has not been influenced by her citizenship, which is regarded as immaterial. We are unable to see that in this case the plaintiff has been refused any right which the Constitution of the United States confers upon her, and accordingly the judgment is

Affirmed.

MR. JUSTICE HOLMES, concurring.

Although I do not dissent from the reasoning of the judgment, I prefer to rest my agreement on the proposition that if the statute cannot operate as it purports to operate it does not operate at all. I do not think that it can be presumed to mean to give to all persons a right to sue in case the Constitution forbids it to make the more limited grant that it attempts. *Connolly* v. *Union Sewer Pipe Co.*, 184 U. S. 540, 565. Apart from the statute no one can maintain an action like this in Ohio. I may add that I do not understand that there is anything in the judgment that contradicts my opinion as to the law.

MR. JUSTICE HARLAN (with whom concurred MR. JUSTICE WHITE and MR. JUSTICE MCKENNA), dissenting.

The plaintiff in error, Elizabeth M. Chambers, a citizen of Pennsylvania, sought by this action against the Baltimore and

Ohio Railroad Company in the Common Pleas Court of Mahoning County, Ohio, to recover damages on account of her husband's death in Pennsylvania in 1902—his death having been caused, it was alleged, by the negligence of the defendant railroad company while operating a part of its line in Pennsylvania. The railroad company was brought into court by due service of summons, and there was a trial resulting in a verdict and judgment in favor of the plaintiff for three thousand dollars. The case was carried upon writ of error to the Circuit Court of Mahoning County and the judgment was there affirmed. That judgment of affirmance was reversed by the Supreme Court of Ohio with directions to enter judgment for the railroad company.

That the laws of Pennsylvania give a right of action, in favor of the widow of a deceased whose death is "occasioned by unlawful violence or negligence," is not disputed. It is equally clear that the present plaintiff's cause of action is not local but is transitory in its nature, and, speaking generally, can be maintained in any jurisdiction where the wrongdoer may be found and be brought before the court. *Dennick* v. *Railroad Company*, 103 U. S. 11; *Stewart* v. *B. & O. R. R. Co.*, 168 U. S. 445.

By a statute of Ohio (1902) in force when this action was brought, it was provided that "whenever the death of a citizen of this State has been or may be caused by a wrongful act, neglect or default in another State, territory or foreign country, for which a right to maintain an action and recover damages in respect thereof is given by a statute of such other State, territory, or foreign country, such right of action may be enforced in this State within the time prescribed for the commencement of such action by the statute of such other State, territory or foreign country." 95 O. L. 401. By a previous statute (1894) suits of that kind were allowed in Ohio when death was caused by a wrongful act, negligence or default in another State if such suits were allowed in the State where the death occurred. But that statute, as stated by the court in this case, was repealed by the above act of 1902. So that the

court, in the present case, held that the act of 1902 changed the former law in two essential particulars: "1. It dispenses with the condition that the State in which the wrongful death occurs shall enforce in its courts the statute of this State of like character. 2. It in terms limits the right therein given to maintain an action in this State for wrongful death occurring in another State, to actions for causing the death of *citizens* of Ohio, whereas the original section 6134*a* gave such right without limitation or restriction as to citizenship." Again, the court said: "Having regard then to the scope and effect of the provisions of the section amended, and to the special character of the amendments made, we think it clear that the legislature, by the adoption of amended section 6134*a* [the act of 1902], undertook and intended thereby to limit and restrict the right to recover in the courts of this State for a wrongful death occurring in another State, to those cases where the person killed was, at the time of his death, a citizen of Ohio." That there may be no mistake as to the decision, I quote the official syllabus of the present case which, by the law of Ohio, is to be taken as indicating the point actually in judgment: "No action can be maintained in the courts of this State upon a cause of action for wrongful death occurring in another State, *except* where the person wrongfully killed was a *citizen of the State of Ohio.*" 73 Ohio St. 1.

It thus appears that the final judgment in this case for the railroad company rests upon the distinct ground that the courts of Ohio cannot, under the statute of that State, take cognizance of an action for damages, on account of death occurring in another State and caused by wrongful act, neglect or default, *except* where the person wrongfully killed was a citizen of Ohio. In that view, if two persons, one a citizen of Ohio and the other a citizen of Pennsylvania, traveling together on a railroad in Pennsylvania, should both be killed at the same moment and under precisely the same circumstances, in consequence of the negligence or default of the railroad company, the courts of Ohio are closed, by its statute against any suit

for damages brought by the widow or the estate of the citizen of Pennsylvania against the railroad company, but will be open to suit by the widow or the estate of the deceased citizen of Ohio, although by the laws of the State where the death occurred the widow or estate of each decedent would have in the latter State a valid cause of action.

Is a state enactment, having such effect, repugnant to the clause of the Federal Constitution, Art. 4, § 2, which declares that "the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States?" Will not that constitutional guaranty be shorn of much of its value if any State can reserve either for its own citizens, or for the estates of its citizens, privileges and immunities which, even where the facts are the same, it denies to citizens or to the estates of citizens of other States?

It is not necessary to fully enumerate the privileges and immunities secured against hostile discrimination by the constitutional provision in question. All agree that among such privileges and immunities are those which, under our institutions, are fundamental in their nature. I cordially assent to what is said upon this point in the opinion just delivered for the majority of the court. The opinion says: "In the decision of the merits of the case there are some fundamental principles which are of controlling effect. The right to sue and defend in the courts is the alternative of force. In an organized society it is the right conservative of all other rights, and lies at the foundation of orderly government. It is one of the highest and most essential privileges of citizenship, and must be allowed by each State to the citizens of all other States to the precise extent that it is allowed to its own citizens. Equality of treatment in this respect is not left to depend upon comity between the States, but is granted and protected by the Federal Constitution. . . . The privileges which it [the State] affords to one class it must afford to the other. Any law by which privileges to begin actions in the courts are given to its own citizens and withheld from the citizens of other

States is void, because in conflict with the supreme law of the land."

These views are supported by the former decisions of this and other courts. In the leading case of *Corfield* v. *Coryell*, 4 Wash. C. C. 571, 580, Mr. Justice Washington said: "The inquiry is what are the privileges and immunities of citizens in the several States? We feel no hesitation in confining these expressions to those privileges and immunities which are, in their nature, fundamental, which belong, of right, to the citizens of all free governments, and which have, at all times, been enjoyed by the citizens of the several States which compose this Union from the time of their becoming free, independent and sovereign. What these fundamental principles are it would perhaps be more tedious than difficult to enumerate." Among the particular privileges and immunities which are clearly to be deemed fundamental, the court in that case specifies the right "*to institute and maintain actions of any kind in the courts of the State.*"

In *Paul* v. *Virginia*, 8 Wall. 168, 180, the court, speaking by Mr. Justice Field, said: "It was undoubtedly the object of the clause in question [Const. Art. 4, § 2] to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned. It relieves them from the disabilities of alienage in other States; it inhibits discriminating legislation against them by other States; it gives them the right of free ingress into other States, and egress from them; it insures to them in other States the same freedom possessed by the citizens of those States in the acquisition and enjoyment of property and in the pursuit of happiness; and it secures to them in other States the equal protection of their laws. It has been justly said that no provision in the Constitution has tended so strongly to constitute the citizens of the United States one people as this. Indeed, without some provision of the kind removing from the citizens of each State the disabilities of alienage in the other States, and giving them equality of privilege with citizens of

those States, the Republic would have constituted little more than a league of States; it would not have constituted the Union which now exists."

So, in *Ward* v. *Maryland*, 12 Wall. 418, 430, the court, after referring to *Corfield* v. *Coryell*, above cited, and, speaking by Mr. Justice Clifford, stated that the right "to maintain actions in the courts of the State" was fundamental and was protected by the constitutional clause in question against state enactments that discriminated against citizens of other States.

Referring to the cases just cited, and to the constitutional clause in question, Mr. Justice Miller, speaking for the court in the *Slaughter-House Cases*, 16 Wall. 36, 77, said: "Its sole purpose was to declare to the several States, that whatever those rights, as you grant or establish them to your own citizens, or as you limit or qualify, or impose restrictions on their exercise, the same, neither more nor less, shall be the measure of the rights of citizens of other States within your jurisdiction."

In *Cole* v. *Cunningham*, 133 U. S. 107, 114, the present Chief Justice, speaking for the court, said: "The intention of section 2 of Article IV was to confer on the citizens of the several States a general citizenship, and to communicate all the privileges and immunities which the citizens of the same State would be entitled to under the like circumstances, *and this includes the right to institute actions.*"

In the more recent case of *Blake* v. *McClung*, 172 U. S. 239, 256, the court said: "We must not be understood as saying that a citizen of one State is entitled to enjoy in another State *every* privilege that may be given in the latter to its own citizens. There are privileges that may be accorded by a State to its own people in which citizens of other States may not participate except in conformity to such reasonable regulations as may be established by the State. *For instance, a State cannot forbid citizens of other States from suing in its courts, that right being enjoyed by its own people;* but it may require a non-resident, although a citizen of another State, to give bond for costs, although such bond be not required of a resident. Such

a regulation of the internal affairs of a State cannot reasonably be characterized as hostile to the fundamental rights of citizens of other States. . . . The Constitution forbids only such legislation affecting citizens of the respective States as will substantially or practically put a citizen of one State in a condition of alienage when he is within or when he removes to another State, or when asserting in another State the rights that commonly appertain to those who are part of the political community known as the People of the United States, by and for whom the Government of the Union was ordained and established."

These cases, I think, require the reversal of the judgment of the Supreme Court upon the ground that it denies to the plaintiff a right secured by the Constitution of the United States. The statute of Ohio, we have seen, closes the doors of the courts of that State against the present plaintiff alone because her deceased husband was not at the time of his death a citizen of Ohio. Thus, every citizen of Ohio, when in another State, for whatever purpose, is accompanied by the assurance on the part of his State that its courts will be open for suit by his widow or representative if his death, while in another State, is caused by the negligence or default of another person or company. But that privilege is denied by the Ohio statute to the representative of citizens of other States meeting death under like circumstances. Indeed, if a citizen of Ohio should go into another State and while there *willfully*, or by some wrongful act, neglect or default on his part, cause the death of some one, although he might be liable to a suit for damages in the State where death occurred, yet if sued for damages in the courts of his own State, he need only plead in bar of the action in Ohio that the decedent was not, at the time of his death, a citizen of Ohio. Such, it seems to me, is the operation of the statute of Ohio as it is interpreted by the court below.

The Supreme Court of Ohio, it will be observed, does not base its judgment upon any common law of the State apart from its statutes. It says: "From a consideration of the statutes

hereinbefore referred to, and the former decisions of this court, we think it must now be held to be the recognized policy and established law of this State, that an action for wrongful death occurring in another State, will not be enforced in the courts of this State, *except* where the person killed was, at the time of his death, a citizen of Ohio." It places its judgment on its statutes and judicial decisions, which it regards as together indicating the policy and law of the State to be such as to preclude an action for damages, except where the deceased was a citizen of Ohio. That exception, upon whatever basis it may be rested, must fall before the Constitution of the United States and be treated as a nullity. The denial to the widow or representative of Chambers of the right to sue in Ohio upon the ground that he was not a citizen of Ohio when killed was the denial, in every essential sense, of a fundamental privilege belonging to him under the Constitution in virtue of his being a citizen of one of the States of the Union—the right to sue and defend in the courts of justice, which right this court concedes to be "one of the highest and most essential privileges of citizenship." While in life Chambers enjoyed the right—and it was a most valuable right—of such protection as came from the rule established in Pennsylvania, that, in case of his death in consequence of the negligence of others, the wrong done to the deceased in his lifetime could be remedied by means of suit brought in the name and for the benefit of his widow or personal representative. But Ohio takes this right of protection from him; for, the Ohio court would have taken cognizance of this action if the decedent Chambers had been, when killed, a citizen of Ohio, while it denies relief to his widow, and puts her out of court solely because her husband was, when killed, a citizen of another State. It thus accords to the Ohio widow of a deceased Ohio citizen a privilege which it withholds from the Pennsylvania widow of a deceased Pennsylvania citizen. If the statutes of Ohio had excluded from the jurisdiction of the courts of that State *all* actions for damages on account of death a different question would be presented. But that is

not what Ohio has assumed to do. As already shown, it allows suits for damages like the present one, where the death occurred in another State, *provided the deceased was a citizen of Ohio, but prohibits them where he was a citizen of some other State.* The final judgment in this case therefore denies a fundamental right inhering in citizenship, and protected by section 2 of Article IV of the Constitution. The Constitution is the supreme law of the land. But it would not be supreme if any right given by it could be overridden either by state enactment or by judicial decision. In *Higgins* v. *Central New Eng. &c. Railroad*, 155 Massachusetts, 176, 180, the Supreme Judicial Court of Massachusetts, after referring to transitory causes of action which did not exist at common law, but were created by the statute of another State and passed to the administrator of the deceased, said: "When an action is brought upon it here, the plaintiff is not met by any difficulty upon these points. Whether our courts will entertain it depends upon the general principles which are to be applied in determining the question whether actions founded upon the laws of other States shall be heard here. These principles require that, in case of other than penal actions, the foreign law, if not contrary to our public policy, or to abstract justice or pure morals, or calculated to injure the State or its citizens, shall be recognized and enforced here, if we have jurisdiction of all necessary parties, and if we can see that, consistently with our own forms of procedure and law of trials, we can do substantial justice between the parties." The statute of Pennsyvania which gave the plaintiff as widow of the deceased a right to sue for damages does not offend natural justice or good morals, nor is it calculated to injure the citizens of any State, not even those of Ohio, nor can it be said to offend any policy of that State which has been made applicable equally to its own citizens and citizens of other States. The case is plainly one in which Ohio attempts, in reference to certain kinds of actions that are maintainable in perhaps every State of the Union, including Ohio, to give to its own citizens privileges which it denies, under like circumstances,

to citizens of other States. To a citizen of Ohio it says: "If you go into Pennsylvania, and are killed while there, in consequence of the negligence or default of some one, your widow may have access to the Ohio courts in a suit for damages, provided the wrongdoer can be reached in Ohio by service of process." But to the citizen of Pennsylvania it says: "If you come to your death in that State by reason of the negligence or default of some one, *even if the wrongdoer be a citizen of Ohio,* your widow shall not sue the Ohio wrongdoer in an Ohio court for damages because, and only because, you are a citizen of another State." This is an illegal discrimination against living citizens of other States, and the difficulty is not met by the suggestion that no discrimination is made against the widow of the deceased because of *her* citizenship in another State. The statute of Pennsylvania in question had in view the protection of persons, while alive, against negligence or default causing death. It must have had that object in view. I submit that no State can authorize its courts to deny or disregard the constitutional guaranty that the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States.

With entire respect for the views of others, I am constrained to say that, in my opinion, so much of the local law, whether statutory or otherwise, as permits suits of this kind for damages, where the deceased was a citizen of Ohio, but forbids such suits where the deceased was not a citizen of Ohio, is unconstitutional. The judgment under review should be reversed.